CASES ON RESTRAINT OF TRADE I.

WYMAN

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CASES ON RESTRAINT OF TRADE

PART I

EDITED BY
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CASES ON RESTRAINT OF TRADE.

CHAPTER I. — COMPETITION.

SECTION I. — EXTENT OF COMPETITION.

A. Free Competition.

ANONYMOUS.

In the Common Pleas, Hilary Term, 1410.

[*Reported in Year Book*, 11 *Henry IV.*, *folio* 47, *placitum* 21.]

Two masters of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40*d.* or two shillings a quarter from each child, now they got only 12*d.*, to their damage, &c.

Tillesley. His writ is worthless.

Skrene. It is a good action on the case, and the plaintiffs have shown well enough how they are damaged; wherefore, &c.

Hankford, J. There may be *damnum absque injuria*. As if I have a mill, and my neighbor builds another mill, whereby the profit of mine is diminished, I shall have no action against him; still I am damaged, *quod* Thirning, C. J., *concessit*, and said that the instruction of children is a spiritual matter; and if one retains a master in his house to teach his children, it is a damage to the common master of the town, yet I think he will have no action.

Skrene. The masters of Paul's claim that there shall be no other masters in all London except themselves.

Horton demurred because the action was not maintainable.

Hill, J. There is no ground to maintain this action, since the plaintiffs have no estate, but a ministry for the time; and though another equally competent with the plaintiffs comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law.

Skrene. If a market is erected to the nuisance of my market, I shall have an assize of nuisance; and in a common case if those coming to my market be disturbed or beaten, whereby I lose my toll, I shall have a good action on my case; so here.

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HANKFORD, J. Not the same case, because in the case put you have a freehold and inheritance in the market; but here the plaintiffs have no estate in the schoolmastership, &c., but for an uncertain time, and it would be against reason for a master to be hindered from keeping school where he pleases, unless where a university was incorporated or a school founded in ancient times.

And the opinion of the court was that the writ would not lie. Wherefore it was awarded that they should take nothing, &c.

JOHNSON *v.* HITCHCOCK.

IN THE SUPREME COURT OF NEW YORK, 1818.

[*Reported* 15 *Johnson*, 185.]

IN error, on *certiorari* to a justice's court.

This was an action on the case brought by the defendant in error against the plaintiff in error, for a disturbance of his right of ferry, and his use and enjoyment thereof, and hindering persons from crossing at the same. It appeared that the defendant below had endeavored to divert travellers from the ferry of the plaintiff, representing it not to be as good as another near it, and had, on many occasions, succeeded. No evidence was offered on the part of the defendant, and the jury found a verdict for the plaintiff below for twenty-two dollars and sixteen cents, on which judgment was rendered.

PER CURIAM. It is clear, from the evidence, that the defendant below has, on many occasions, interfered, and prevented persons from crossing at the plaintiff's ferry; and if there is a good cause of action, the testimony shows an injury, probably, to the amount of the recovery. But there is no principle on which this action can be sustained. The evidence, imperfectly as it is stated, is sufficient to warrant the conclusion, that these are rival ferries near each other, and that the defendant below was unfriendly to the plaintiff's ferry, and endeavored to turn the custom to the other. This action does not appear to be founded on any slander of title, even admitting that an action of that kind might be sustained in a justice's court. Both ferries, from anything that appears to the contrary, have equal rights, and equal claims to be upheld and supported, and it cannot furnish a cause of action that travellers have been persuaded to cross the one rather than the other. If an action would lie in this case, it would in all cases of rival business, where any means are used to draw custom; and if this were once admitted, it would be difficult to know where to stop. The judgment must be reversed.

Judgment reversed.

SNOWDEN *v.* NOAH.

In the Court of Chancery of New York, 1825.

[*Reported Hopkins*, 351.]

The Chancellor. The defendant Noah was the editor but not the proprietor of the newspaper establishment called the National Advocate; and immediately after the sale of that establishment by its former proprietor to the complainant, Noah established another newspaper, under the title of the New York National Advocate. This new gazette, thus established, is sent to the subscribers of the former National Advocate, and Noah has solicited and continues to solicit the support of the patrons of the former paper and of the public to his new paper. This is briefly and in substance the case upon which an injunction is now asked.

The business of printing and publishing newspapers, being equally free to all, the loss to one newspaper establishment, which may follow from the competition of any rival establishment, is merely a consequence of the freedom of this occupation, and gives no claim to legal redress. But a newspaper establishment is also a subject of property; and so far as the rights of such an establishment are private and exclusive, this species of property, like any other, is entitled to the protection of the laws.

The material property of the National Advocate is not here in question. The printing office, press, types, and other materials of a printing establishment, are subjects of exclusive right; and the injuries alleged in the bill, in respect to these subjects in this case, are matters for which redress must be sought in the courts of law.

The subject in respect to which an injunction is asked is what is called the good will of the establishment, or the custom and support which the National Advocate had before received from its subscribers and patrons, or from the public. The effort of Noah is to obtain for his newspaper the support of the public in general, and especially the custom and good will of the friends of the National Advocate; this object is distinctly avowed; and an open appeal is made to the friends of the National Advocate and to the public to give their support to the new paper. The question is, whether the acts of Noah are an invasion of the private rights of Snowden, as the proprietor of the National Advocate, or merely an exercise of the common right to print and publish a new journal, and to obtain for it patronage.

The open appeal made to the public in favor of the new journal, as a new and distinct paper, seems to remove from this case every objection. Noah is at liberty to invite the subscribers and patrons of the National Advocate to give him their support; and they are entirely free to accept or reject his invitation. They, like others, may give their support to either, or neither, or both of these papers. The only

circumstance in this case, which has any appearance of an undue encroachment upon the rights of Snowden, is that Noah's new paper is published under a name nearly the same with that of Snowden. But the name of the new paper is sufficiently distinct from the name of Snowden's paper to apprize all persons that these are really different papers. These different titles and the different matters which must appear in two daily gazettes seem to afford all the information which can be desired by those who choose to give their patronage to either of these papers. I do not perceive that any person can be misled in this respect; and the whole case seems to be nothing more than an open competition between two newspaper establishments for the good will of those who were the patrons of the first establishment, and for the favor of the public.

The good will of an established trade, the custom of an inn, and the right of a publisher of books, may be injured by acts of deception or piracy; but the injury for which redress is given in such cases results from the imposture practised upon the customers of an existing establishment, or upon the public. When the friends of an existing newspaper and the public are informed by a rival newspaper that the two papers are not the same, but are distinct establishments, there is no deception; and the detriment which either establishment may suffer from the competition of the other results from the free option of those who choose to give their support to one establishment in preference to the other. This employment is subject to all the incidents of a free competition; and when no deception is practised, the award of the public, or of those who patronize newspapers, must determine the patronage which each rival press shall receive.

The adjudged cases cited in support of this application are *Hogg* v. *Kirby*, 8 Vesey junior, 215, and *Crutwell* v. *Lye*, 17 Vesey junior, 336. These cases seem to be rather authorities against the application. In the last of them, the substance of Lord Eldon's opinion was expressed in the following sentence, which is directly applicable to this case. "It amounts to no more than that he asserts a right to set up this trade, and has set it up, as the like, but not the same trade, with that sold; taking only those means, which he had a right to take, to improve it; and there is no fact, amounting to fraud, upon the contract made with the plaintiff."

It appears to me that every person who is disposed to patronize or support the National Advocate may do so, without being deceived or misled by the existence or publication of the New York National Advocate. The struggle of these parties seems to be merely a competition, in which there is no imposture or deception. I do not perceive any fraud; but if there is any question whether the acts of Noah are a fair competition or a fraudulent interference with the establishment of Snowden, it is a question wholly uncertain; and as a doubtful matter of fact, it should be left to the trial by jury, in the ordinary course of law. The writ of injunction is a most important remedy; but it is used to protect rights which are clear, or at least

free from reasonable doubt. Upon all the facts of the case, the motion for an injunction is denied.

PUDSEY COAL GAS CO. *v.* CORPORATION OF BRADFORD.

In Chancery, 1872.

[*Reported L. R.* 15 *Eq.* 167.]

Sir R. Malins, V. C. This is a demurrer by the mayor, aldermen, and burgesses of the borough of Bradford to a bill filed against them by the Pudsey Coal Gas Company. The prayer of the bill asks for a declaration that the defendants, the corporation, are not entitled to supply gas to any street, building, or place which is not within the limits of their parliamentary boundary, and for an injunction to restrain them from supplying gas beyond those limits.

It appears from the allegations of the bill that the township of Pudsey is immediately contiguous to the borough of Bradford, and that the corporation of Bradford have had transferred to them, under the authority of the Bradford Corporation Gas and Improvement Act, 1871, the rights of the Bradford Gaslight Company, which included compulsory powers to break up streets, and to lay down pipes, and to do other acts for the purpose of enabling them to supply gas to the town of Bradford and some adjoining districts. It appears that no part of the township of Pudsey was within the borough of Bradford, or within the limits to which the Bradford Gaslight Company's Acts applied. Under two other Acts of Parliament the plaintiffs had similar compulsory powers with respect to the township of Pudsey. By one of them, the Pudsey Gas Act, 1855, the limits were prescribed within which it might be put in force, and the corporation had, under their act, only the same powers as had previously belonged to the Bradford Gaslight Company.

It is, therefore, perfectly clear that the parliamentary powers of the Bradford corporation were limited to the borough of Bradford and certain specified adjoining places, and those of the plaintiffs were limited to the township of Pudsey and certain other adjoining localities. The argument on the part of the plaintiffs is, that the Bradford corporation are a body existing for certain special purposes, and that beyond duties belonging to those purposes they have no right to do anything; and that, as regards the supply of gas, they have no right to go beyond their statutory limits. There is much to be said for this view. I am very much inclined to think that, on principle, I should have come to the same conclusion. But I think that the question has been already determined.

I think it is quite clear that a gas company have no right to do anything which would amount to a nuisance, except where they have parliamentary powers; but there is nothing to prevent them supply-

ing gas just as they like, if they can do so without causing any inconvenience. I consider, therefore, that *Attorney-General* v. *Cambridge Consumers Gas Company*,[1] and the cases like it, have very little to do with the present question. But the case which has most bearing on the present case is *Stockport District Waterworks Company* v. *Corporation of Manchester*,[2] and it seems to be entirely against the plaintiffs. The plaintiffs in that case were a company having power to take water from a particular river for the supply of a particular district, and the defendants, the corporation of Manchester, had allowed the other defendants, who were called the Stockport Waterworks Company, to effect a junction with their pipes, and so draw water for the supply of part of the plaintiffs' district. The plaintiffs then filed a bill against the corporation and the Stockport Waterworks Company for an injunction to restrain them supplying water in this way. A demurrer was filed and was allowed by the Vice-Chancellor before whom the case came, and the case went on appeal before Lord Westbury, who laid down the rule that an incorporated company has only such powers as have been conferred upon it. But the demurrer having been filed, the question was whether it was to be allowed or overruled. The Vice-Chancellor had allowed the demurrer, and the Lord Chancellor, though he was of opinion that the corporation had no right to do what the bill alleged them to have done, considered that there was no allegation of private right which entitled the plaintiffs to maintain the suit.

But in that case there was, in effect, the same allegation of private injury as in the present, because I find that the bill alleged that it was not within the powers of the corporation to furnish the water for the supply of Stockport and other towns, and that the just rights of the plaintiffs would be seriously prejudiced and injured.

I am of opinion that the allegation in the 14th paragraph of the bill, that "great loss will be sustained by the plaintiffs if the said illegal acts of the corporation are permitted to continue," is not such an allegation of a private injury as this court will allow as the foundation for a bill. I am unable to see that this case can be distinguished from *Stockbridge District Waterworks Company* v. *Corporation of Manchester*.[3] I must, therefore, allow the demurrer.

HOPKINS *v.* GREAT NORTHERN RAILWAY.

In the Court of Appeals, 1877.

[*Reported* 2 *Q. B. D.* 224.[4]]

[Plaintiffs were owners in fee of a certain ancient and exclusive ferry over the River Nene. Defendants constructed a bridge and footway across the River Nene for their railway distant from the

[1] L. R. 4 Ch. 71; 6 Eq. 282.
[2] 9 Jur. (N. S.) 266.
[3] 9 Jur. (N. S.) 267.
[4] This case is abridged. — Ed.

landing places of the ferry about half a mile. Traffic over the ferry so fell off after the operation of the railroad began that it was ultimately given up. Plaintiffs now bring action under the Railway Clauses Act for damages.]

Mellish, L. J. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected.

Judgment reversed, and entered for the defendants.

EAST TENNESSEE TELEPHONE CO. *v.* ANDERSON COUNTY TELEPHONE CO.

In the Court of Appeals of Kentucky, 1900.

[*Reported* 57 *Southwestern Reporter*, 457.]

Petition for an injunction.

Hazelrigg, J. The ordinance adopted by the town of Lawrenceburg, granting the franchise to appellant to establish and operate a telephone system in that town, was passed by the city council on the day of its introduction, and did not lie over five days, as required by section 3636, Ky. St. We regard this provision of the statutes as a highly important one, and as mandatory. Whatever rights — exclusive or otherwise — the appellant may have had, if possessed of proper municipal authority, to prevent its competitor (the appellee) from erecting a rival telephone plant, it certainly cannot prevent appellee from so doing when acting without such authority. The chancellor therefore properly dismissed the appellant's petition. The other questions raised on the appeal need not be considered.

Judgment affirmed.

RAILWAY CO. *v.* TELEGRAPH ASSOCIATION.

In the Supreme Court of Ohio, 1891.

[*Reported* 48 *Oh. St.* 390.[1]]

[Action by the defendant in error, a telephone company, against the plaintiff in error, an electric street railway. The complaint was that the operation of the street railway by the single trolley system with return by a ground circuit interfered with the operation of the telephone system by a single wire with return by a ground circuit. The court below rendered judgment in favor of the Telegraph Association against the Railway Company. Appeal.]

Dickman, J. . . . The demand made by the Telegraph Association is, not that the Railway Company shall so modify its existing electrical apparatus as not to interfere with the telephone service, but shall forever abandon the use of an essential part of its electro-motive system, or be perpetually enjoined. In other words, the Association claims the exclusive use of the grounded circuit, inasmuch as the mechanism of the telephone is so complex, and the electric currents employed so delicate and sensitive, that they cannot be used without disturbance from the heavier currents employed by neighboring electrical enterprises that operate with the grounded circuit. We find no foundation for such an exclusive franchise or right. When the Telegraph Association began its operation under the telephone system, neither the statute authorizing it to erect and maintain poles, wires, and other necessary fixtures, nor the ordinance under which it obtained the power to extend its lines in the streets, gave an exclusive right either to use the earth for a return circuit, or a complete metallic circuit formed by double wires. The legislature did not grant the right by general enactment, nor was the municipal corporation empowered by the legislature to give the Telegraph Association the exclusive right to make use of its streets so as to create a monopoly. In *State* v. *Cincinnati Gas Light and Coke Co.*, 18 Ohio St. 262, it was held that a municipal corporation cannot, without clear legislative authority, grant an exclusive right to the use of the streets for certain purposes to an individual or corporation. To enable it to grant such an exclusive right by ordinance in the nature of a contract, the power must be shown to have been expressly granted, or to be so far necessary to the proper execution of the powers which are expressly granted as to make its existence free from doubt.

In the year 1838, Professor Steinheil made the important discovery of the practicability of using the earth as one half, or the returning section of an electric circuit. Professor Morse claimed to have made the discovery about the same time, but he failed to obtain a patent therefor. It was the discovery of an elementary principle of science, of

[1] This case is abridged. — Ed.

a truth in physics. For forty years before the telephone was discovered, the use of the earth as a conducting medium in the formation of an electric circuit has been the common property of every electrical enterprise.

Judgment accordingly.

AVERILL *v.* SOUTHERN RY. CO. ET AL.

IN THE CIRCUIT COURT OF THE UNITED STATES, 1896.

[*Reported* 75 *Federal Reporter*, 736.]

[BILL filed by a receiver of the Port Royal Ry., asking the aid of the court in protecting the property against a rate war inaugurated by the Southern Ry. A cut of 35% had been made with notice that if this was met a further cut of 80% would be made in the rates. It was alleged that its ultimate object in this was to annihilate competition by the destruction of its competitors.]

SIMONTON, Circuit Judge. The destructive results of a rate war waged between two great systems of railroads are recognized and deprecated by men of the greatest ability who have considered the subject. They impair and destroy the usefulness of the railroads themselves, and their ability to serve the public with certainty, efficiency, and safety. The business interests of the community which move the crops and bring supplies to the consumer require that rates be stable. Every precaution has been taken by state legislatures and by the congress to keep them just and reasonable, — just and reasonable for the public and for the carriers. A few favored points and a few persons may for a short time receive temporary advantage. But the result of such a war is the destruction of values, the disturbance and injury of all business interests, the demoralization and confusion of rates, and great public and private loss. As Judge Cooley has said, the prevention of these rate wars and the disastrous consequences resulting from them is the problem of the age. Whether the powers of courts of equity, state as well as federal, are elastic enough to grapple with the evil; whether the primary trust (the public good) on which railroads hold their property is one which can be enforced in the courts; whether the federal courts are able to meet and to defeat measures which obstruct and tend to destroy interstate commerce, — these are questions which sooner or later must be heard and determined. But, to give effect to such hearing and determination, the cause in which they are heard and determined must have in it all parties necessary to make the determination practical to reach the end desired. Courts do not discuss abstract questions or determine them *en thesis.*

FREE COMPETITION. — Examples of this established law appear throughout this chapter. — ED.

B. Unfree Competition.

SIR GEORGE FERMOR *v.* BROOKE.

In the Queen's Bench, 1590.

[*Reported Cro. Eliz.* 203.]

Action upon the case for erecting a bakehouse in Tossiter. And declares, that whereas time out of mind, &c., there had been a manor called Tossiter in the same county; and for the same time, there had been a town of Tossiter; and that all the land within the said town of Tossiter had been holden of the said manor, of which he is lord; and that he and all his ancestors, and all those whose estate, &c. had used to have a bakehouse, and a baker there, to bake white bread and horse bread for all the inhabitants there, and strangers passengers; and that none by the said time, &c. had used to have a bakehouse there, but by their appointment; yet the defendant had erected a bakehouse there, *ad nocumentum suum.* The defendant taketh all by protestation, except that he confessed that there is such a town; and pleaded that at the time when he erected his bakehouse, that there were three bakers there, and that he was an apprentice to the trade, and that he set up the bakehouse for the benefit of all persons, as it was lawful for him to do. And upon this plea the plaintiff demurred; and it was argued by *Francis Morgan,* for the plaintiff, and *Buckley,* for the defendant. And it was adjudged for the plaintiff; for the custom is between the lord and his tenants, which by indenture may have a good and lawful beginning; and peradventure their lands were given to them upon this condition; and it is reasonable that the lord maintaining a bakehouse, that for this charge they should have reasonable recompence. And the plaintiff had judgment.

CORPORATION OF WEAVERS *v.* BROWN.

In the Queen's Bench, 1601.

[*Reported Cro. Eliz.* 803.]

Action upon the case; supposing, that the plaintiffs, from time whereof, &c., where a corporation in London, &c., paying for it twenty shillings and eightpence to the queen per annum, &c., and that the custom there is, that none ought to intermeddle with their guild, nor with their art within London or Southwark, but those of the guild;

and that the defendant, being none of their guild, had bought forty pounds worth of silk of one R. to be woven, and had weaved it, &c. The defendant pleaded not guilty; and a special verdict found these customs, &c., and that the defendant, being a stranger, had received of R. forty pounds worth of silk to be woven, and had carried it to Hackney, and there had woven it, and had brought it back to London, and received his salary, &c. *Et si, &c.*

And hereupon all the court resolved, that it was not any offence; for although it were a good custom, as they all allow it was, being used time, &c., yet this contracting for it in London, and working of it in the country, is not intermeddling with their trade in London; no more than if a taylor should buy cloth, or receive any other thing in London, and make a garment thereof in the country; and although it be a contracting in London, yet it is no intermeddling with the trade. Wherefore it was adjudged for the defendant.

TRIPP *v.* FRANK.

In the Kings Bench, 1792.

[*Reported* 4 *T. R.* 666.[1]]

This was an action on the case; wherein the plaintiff declared that he was possessed of South Ferry over the Humber, and that the defendant wrongfully carried persons and cattle from Kingston upon Hull to Barton, and other parts of the coast, whereby the plaintiff was injured in his right to his ferry, and lost his tolls. There was an exception stated with respect to the inhabitants of Barton, strangers who do not stay longer than flood-tide, and market-people from the different parts of the Lincolnshire coast passing and repassing on market and fair days in market-boats. At the trial before Buller, J., at the last assizes for York, it appeared that the plaintiff was lessee of the corporation of Kingston upon Hull; and he proved a prescription in them to an exclusive ferry between that place and Barton, on the opposite coast of Lincolnshire. with the exceptions before stated. And it appeared that the defendant, who was the owner of a market-boat at Barrow, had carried over persons at different times than on market-days from Kingston upon Hull to Barrow, to which place they were going, and which lies two miles lower down the Humber than Barton, upon the same coast. It was shown that there was a daily ferry between Kingston and Barton, but none to any other part of the Lincolnshire coast. A verdict was taken for the plaintiff of 1*s.*, with liberty for the defendant to enter a nonsuit in case the court should be of opinion that the plaintiff was not entitled to recover

[1] Only the opinion of Lord Kenyon, C. J., is given; the other justices concurred. — Ed.

under these circumstances. A rule *nisi* having been granted for that purpose.

Lord Kenyon, C. J. — It seems to me that the evidence does not support this action. If certain persons wishing to go to Barton had applied to the defendant, and he had carried them a little distance above or below the ferry, it would have been a fraud on the plaintiff's right, and would be the ground of an action. But here these persons were substantially, and not colorably merely, carried over to a different place; and it is absurd to say that no person shall be permitted to go to any other place on the Humber than that to which the plaintiff chooses to carry them. It is now admitted that the ferryman cannot be compelled to carry passengers to any other place than Barton; then his right must be commensurate with his duty.

Rule discharged.

BOSTON & LOWELL R. R. *v.* SALEM & LOWELL R. R.

In the Supreme Court of Massachusetts, 1854.

[*Reported* 2 *Gray*, 1.[1]]

[Bill in equity by the Boston & Lowell R. R. against the Salem & Lowell R. R., the Lowell & Lawrence R. R., and the Boston & Maine R. R. The bill alleged that by express provision in its charter the Boston & Lowell R. R. had the exclusive right for thirty years to a railroad between Boston & Lowell. The bill then alleged that by a junction between the Lowell & Lawrence R. R. with the Salem & Lowell R. R., and by an intersection of the Salem & Lowell R. R. with the Boston & Maine R. R. at Wilmington, a line of railroad communication nearly parallel with the plaintiff road was created by the defendant roads between Lowell and Boston, which line was only about one mile longer and never more than three miles distant. The bill next alleged that the defendants were running through trains between Boston and Lowell. Prayer for an injunction. Demurrer.]

Shaw, C. J. . . . As the result of the whole case, the court are of opinion that the Boston and Lowell Railroad Corporation acquired by their charter and act of incorporation a right, at their own charge and expense, but for the public accommodation and use, to locate and construct a railroad from the city of Boston to Lowell, for the transportation and conveyance of persons and property between those places by railroad cars, and to levy and receive, for their own benefit and reimbursement, certain tolls, for the carriage of persons and property; and that, as a part of their franchise, privilege, and right, and the better to secure to them a just and reasonable compensation and

[1] This case is abridged. — Ed.

reimbursement, by the tolls so granted, the Commonwealth did, by the said act of incorporation, grant to and stipulate with the said corporation, that no other railroad, within the time therein limited, and not yet elapsed, should be authorized to be made, leading from Boston, Charlestown, or Cambridge (Charlestown then embracing the territory now composing the town of Somerville), to any place within five miles of the northern termination of said railroad at Lowell. Without such authority of the legislature, we think that no such railroad within the limits prescribed could be lawfully made by other persons or corporations; and therefore this grant and stipulation, to a certain extent exclusive, was a part, and a valuable part, of the plaintiffs' franchise; and that this grant and stipulation it was competent for the legislature, in behalf of the public, to make; and that the same was a valid grant and contract.

We are also of opinion that the legislature have not, since the granting of said charter, by right of eminent domain, taken, or manifested any intention to take, any part of the right and franchise of the plaintiffs for public use, and that no act or charter has been granted to the three defendant corporations, either or all of them, to take or use any part of the right and franchise of the plaintiffs; and if in any manner the acts of the defendants, under color of their acts of incorporation, do infringe upon the rights of the plaintiffs, such infringement is not warranted by either or all of the same acts, it is unlawful, and constitutes a disturbance and nuisance to the plaintiffs, for which they are entitled to a remedy. We are also of opinion that the several defendant corporations, having been incorporated and chartered to establish railroads between several termini, according to their respective acts of incorporation, have no right, by the use and combination of several sections of their respective railroads, to establish a continuous and uninterrupted line of transportation by railroad, of persons and property, between Lowell and Boston; and that the actual establishment of such a continuous line of transportation by railroad is substantially making a railroad, other than that authorized to be made by the plaintiffs, to their injury, and contrary to the rights conferred on them by their charter.

Demurrer overruled.

THE BINGHAMTON BRIDGE.

[CHENANGO BRIDGE CO. *v.* BINGHAMTON BRIDGE CO.]

1865. 3 *Wallace U. S.* 51.[1]

ERROR to the New York Court of Appeals.

Bill in equity by Chenango Bridge Co. to enjoin Binghamton Bridge Co. The plaintiff company was chartered by Section 4 of the Act of 1808, "for the purpose of erecting and maintaining a toll-bridge across the Chenango River, at or near Chenango Point." The corporation was "to have perpetual succession, under all the provisions, regulations, restrictions, clauses and provisions of the before-mentioned Susquehanna Bridge Company," (referred to in Section 3 of the same Act of 1808.) The latter company was incorporated by Section 38 of the Act of 1805, which gave the Susquehanna Bridge Co. all the "powers, rights, privileges, immunities, and advantages," contained in the incorporation of the Delaware Bridge Co. by Section 31 of the same Act of 1805. Said Section 31 enacted: "It shall not be lawful for any person or persons to erect any bridge, or establish any ferry across the said west and east branches of Delaware River, within two miles either above or below the bridges to be erected and maintained in pursuance of this act." Soon after the passage of the Act of 1808, the plaintiff company built a toll-bridge across the Chenango River, at Chenango Point. In 1855, the legislature granted a charter to the Binghamton Bridge Co., purporting to authorize the building of a bridge in close proximity to that of the plaintiffs. The latter company built a bridge a few rods above the old one. The old company filed a bill in the Supreme Court of New York to enjoin the new company. The plaintiffs contended that the exclusive rights given by Section 31 of the Act of 1805 to the Delaware Bridge Co. were imported by Section 38 of that Act into the charter of the Susquehanna Co.; that these again, thus imported, were translated into Section 3 of the Act of 1808; and that these last were carried finally into Section 4 of the latter Act; thus making a contract by the State with the Chenango Bridge Co., that no bridge should ever be built over the Chenango River within two miles of their bridge, either above or below it.

The answer denied the contract thus set up.

The Supreme Court of New York dismissed the bill; and this decree was affirmed by the Court of Appeals.

Mr. D. S. Dickenson, for Binghamton Bridge Co.

[1] Statement abridged. Arguments, and parts of opinions, omitted. — ED.

Mr. Mygatt, contra.

Mr. Justice DAVIS delivered the opinion of the Court.[1]

The Constitution of the United States declares that no State shall pass any law impairing the obligation of contracts; and the 25th section of the Judiciary Act provides, that the final judgment or decree of the highest court of a State, in which a decision in a suit can be had, may be examined and reviewed in this court, if there was drawn in question in the suit the validity of a statute of the State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that the bridge is built and open for travel.

The bill seeks to obtain a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built, on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States which says that no State shall pass any law impairing the obligation of contracts. Such proceedings were had in the inferior courts of New York, that the case finally reached and was heard in the Court of Appeals, which is the highest court of law or equity of the State in which a decision of the suit could be had. And that court held that the act, by virtue of which the Binghamton bridge was built, was a valid act, and rendered a final decree dismissing the bill. Everything, therefore, concurs to bring into exercise the appellate power of this court over cases decided in a State court, and to support the writ of error, which seeks to re-examine and correct the final judgment of the Court of Appeals in New York.

The questions presented by this record are of importance, and have received deliberate consideration.

It is said that the revising power of this court over State adjudications is viewed with jealousy. If so, we say, in the words of Chief Justice Marshall, "that the course of the judicial department is marked

[1] Nelson, J., not sitting, being indisposed.

out by law. As this court has never grasped at ungranted jurisdiction, so it never will, we trust, shrink from that which is conferred upon it." The constitutional right of one legislature to grant corporate privileges and franchises, so as to bind and conclude a succeeding one, has been denied. We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was, that an act of incorporation was a contract between the State and the stockholders. All courts at this day are estopped from questioning the doctrine. The security of property rests upon it, and every successful enterprise is undertaken, in the unshaken belief that it will never be forsaken.

A departure from it *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government. An attempt even to reaffirm it, could only tend to lessen its force and obligation. It received its ablest exposition in the case of *Dartmouth College* v. *Woodward*,[1] which case has ever since been considered a landmark by the profession, and no court has since disregarded the doctrine, that the charters of private corporations are contracts, protected from invasion by the Constitution of the United States. And it has since so often received the solemn sanction of this court, that it would unnecessarily lengthen this opinion to refer to the cases, or even enumerate them.

The principle is supported by reason as well as authority. It was well remarked by the Chief Justice, in the Dartmouth College case, "that the objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in most cases the sole consideration for the grant." The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative, that a duty is imposed on Government to provide for them; and as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: "If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill." Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it.

It is argued, as a reason why courts should not be rigid in enforc-

[1] 4 Wheaton, 418.

ing the contracts made by States, that legislative bodies are often overreached by designing men, and dispose of franchises with great recklessness.

If the knowledge that a contract made by a State with individuals is equally protected from invasion as a contract made between natural persons, does not awaken watchfulness and care on the part of law-makers, it is difficult to perceive what would. The corrective to improvident legislation is not in the courts, but is to be found elsewhere.

A great deal of the argument at the bar was devoted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River bridge,[1] the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized, that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. What, then, are the rights of the parties to this controversy?

[After considering the various N. Y. Acts in reference to Bridge Companies, and adopting substantially the construction contended for by plaintiffs, the opinion proceeds as follows:]

The legislature, therefore, contracted with this company, if they

[1] 11 Peters, 544.

would build and maintain a safe and suitable bridge across the Chenango River at Chenango Point, for the accommodation of the public, they should have, in consideration for it, a perpetual charter, the right to take certain specified tolls, and that it should not be lawful for any person or persons to erect any bridge, or establish any ferry, within a distance of two miles, on the Chenango River, either above or below their bridge.

Has the legislature of 1855 broken the contract, which the legislatures of 1805 and 1808 made with the plaintiffs?

The foregoing discussion affords an easy answer to this question. The legislature has the power to license ferries and bridges, and so to regulate them, that no rival ferries or bridges can be established within certain fixed distances. No individual without a license can build a bridge or establish a ferry for general travel, for "it is a well-settled principle of common law that no man may set up a ferry for all passengers, without prescription time out of mind, or a charter from the king. He may make a ferry for his own use, or the use of his family, but not for the common use of all the king's subjects passing that way, because it doth in consequence tend to a common charge, and is become a thing of public interest and use; and every ferry ought to be under a public regulation." As there was no necessity of laying a restraint on unauthorized persons, it is clear that such a restraint was not within the meaning of the legislature. The restraint was on the legislature itself. The plain reading of the provision, "that it shall not be lawful for any person or persons to erect a bridge within a distance of two miles," *is*, that the legislature *will not make it lawful* by licensing any person, or association of persons, to do it. And the obligation includes a free bridge as well as a toll bridge, for the security would be worthless to the corporation if the right by implication was reserved, to authorize the erection of a bridge which should be free to the public. The Binghamton Bridge Company was chartered to construct a bridge for general road travel, like the Chenango bridge, and near to it, and within the prohibited distance. This was a plain violation of the contract which the legislature made with the Chenango Bridge Company, and as such a contract is within the protection of the Constitution of the United States, it follows that the charter of the Binghamton Bridge Company is null and void.

DECREE of the Court of Appeals of New York reversed, and a mandate ordered to issue, with directions to enter a judgment for the plaintiff in error, the Chenango Bridge Company, in conformity with this opinion.

[CHASE, C. J., delivered a dissenting opinion.]

CHASE, C. J., FIELD, J., and GRIER, J., dissented.

PARROTT *v.* CITY OF LAWRENCE ET ALS.

1872. 2 *Dillon U. S. Circuit Court Reports*, 332.[1]

MOTION to dissolve temporary injunction restraining the defendants, the Messrs. Wilson, from operating the ferry hereinafter described. Plaintiff is a citizen of Ohio, and a stockholder in the Lawrence Bridge Co. In his bill in equity, he alleges that the maintenance of the ferry infringes upon the rights of the Bridge Co.; and, to show his right to maintain the bill, alleges that the Bridge Co. and its officers have refused to proceed in the State courts to obtain redress.

Feb. 15, 1857, the Legislative Assembly of the Territory of Kansas incorporated the Lawrence Bridge Co.; granting the *exclusive* right and privilege of building and maintaining a bridge across the Kansas River, at the city of Lawrence for a period of twenty-one years; with power to establish and collect tolls.

Prior to said incorporation of the Bridge Co. the Legislative Assembly had, in 1855, granted to one Baldwin the exclusive right to establish a public ferry within two miles of Lawrence, for a term of fifteen years. The answer of some of the defendants alleges that Baldwin kept a ferry in the immediate vicinity of the bridge for some time after the erection of the bridge; when, for reasons unknown, he ceased to operate the ferry.

By the laws of Kansas, the county commissioners have the power to grant ferry licenses. In January, 1871, the commissioners licensed one Darling to keep a ferry, at Lawrence, for one year. The ferry was operated at first by Darling, and afterwards by the Wilsons, under an arrangement with the city of Lawrence, the city having purchased the ferry-boat of Darling. January 6, 1872, the commissioners granted to the defendant, Wilson, the right to keep and run a ferry on the Kansas River, at the city of Lawrence, for one year.

According to the bill, answer, and affidavits, it appears that the ferry-boat, or, as the bill styles it, the floating bridge, is operated in this way: Two ropes, or cables, are thrown across the river, fastened on each side, one of which is an endless chain. A rope is fastened to the upper side of the boat, or "floating bridge," and this rope glides upon the upper cable by means of a pulley attached to the other end of the rope, said pulley passing from side to side of the river with the boat, the motive power moving the boat back and forth across the stream being a stationary steam engine located on the north bank of the river. The boat itself is an ordinary flat-bottomed boat.

Thacher & Banks, and *N. T. Stephens*, for the complainant.

Wilson Shannon, for the Messrs. Wilson and the city of Lawrence.

DILLON, *Circuit Judge*. The grant to the bridge company by its

[1] Statement abridged. — ED.

charter is "the *exclusive* right and privilege of building and maintaining *a bridge* across the Kansas river at the city of Lawrence," and "to establish and collect tolls for *crossing said bridge.*" If this right has not been invaded, the complainant is not entitled to an injunction against the running of the ferry. I say the *ferry*, for, in my judgment, it is clear that the means used to cross the river by the defendant, Wilson, — viz. a flat-bottomed boat, connected with cables spanning the stream, and moved or propelled back and forth across it by power supplied by a stationary engine on the bank — is a ferry, as distinguished from a bridge, both under the legislation of the State and according to the usual meaning of the word.

The passage over streams is generally effected in one of two ways, viz.: by bridges, which, as commonly constructed for the use of travellers and teams, are immovable structures or extensions of the highways over and across the water; and by boats, which are movable and propelled by steam-power, horse-power, the action of the current, or similar agencies. When the passage is by the latter mode it is called *ferrying*, which implies a boat that moves back and forth across the stream, from bank to bank. The legislation of Kansas everywhere recognizes this distinction between bridges and ferries. In the Statutes of 1855 there are provisions for building bridges (chap. 18), and also for regulating ferries (chap. 71). At the first session of the legislature, in 1855, there were a great many special acts, some authorizing certain persons to build toll-bridges, and others to establish and maintain ferries. Among these numerous acts was one giving to John Baldwin the exclusive right to keep a public ferry across the Kansas river at the town of Lawrence for the period of fifteen years. Two years afterwards the legislature incorporated the Lawrence Bridge Company, giving it the exclusive right to build and maintain a bridge across the river at the same place. Did this invade the franchise which had been granted to Baldwin? Clearly not, for the two grants are different; the one was to keep a ferry and collect tolls or ferriage for crossing the stream by this mode — the other was to erect and maintain a bridge, &c., "to collect tolls for crossing the same." So that during the period for which Baldwin's ferry charter was to run, there were two modes of crossing the river at Lawrence expressly authorized, — the one by means of Baldwin's ferry, the other by means of the bridge of the Lawrence Bridge Company.

The contract of the legislature with the bridge company must be protected from subsequent invasion. But what was that contract? It was simply an exclusive right to build a bridge and to "collect tolls for crossing the same." It is argued that the contract with the bridge company was that the travel of a certain district, to-wit: those passing the river at Lawrence, should pass over this bridge and pay tolls therefor. But it is clear that such was not the contract: 1st, because it is not so expressed, or fairly to be implied from the language used; and, 2d, because the existence of the Baldwin ferry charter, which must be

presumed to have been in the mind of the legislature when it passed the bridge charter, and which, by its terms, would continue in force many years after the period fixed for the completion of the bridge, shows that the legislature did not intend to make a contract with the bridge company to the effect that all persons and property crossing at Lawrence should pass over the bridge.

When we consider that legislative grants creating monopolies, while they are not to be cut down by hostile or strained constructions, are nevertheless not to be enlarged beyond the fair meaning of the language used (*Binghamton Bridge Case*, 3 Wall. 74), this conclusion seems, to my mind, so clear as not to admit of fair doubt.

It has been settled by adjudication that the exclusive right to a toll bridge is not infringed by the erection of an ordinary railroad bridge within the limits over which the exclusive right extended (*Mohawk Bridge Company* v. *Railroad Company*, 6 Paige, 564; *Bridge Proprietors* v. *Hoboken Co.* 1 Wall. 116, 150, and cases cited); and the reasoning upon which this conclusion rests shows that where the charter of the bridge company is silent upon the subject, its exclusive right would not be invaded by the establishment, under legislative authority, of a public ferry, although this would have the incidental effect to injure the value of the franchise of the bridge company. That this is the opinion of the presiding justice of this court is plain from an expression to that effect, by way of argument, in his opinion in the *Hoboken Bridge Case* (1 Wall. 116, 149). In that case the legislature of New Jersey, in 1790, authorized the making of a contract with certain persons for the building of a bridge over the Hackensack river, and by the same statute enacted that it should not be lawful for any person to erect "any *other bridge* over or across the said river for ninety-nine years;" and it was held that the railroad bridge subsequently authorized, which was so constructed as that persons or property could not pass over it except in railway cars, did not impair the legal rights of the bridge proprietors. Mr. Justice MILLER, in discussing the question as to what was the meaning of the Act of 1790 and the contract with the persons who built the bridge, says: "There is no doubt that it was the intention of those who framed those two documents to confer on the persons now represented by the plaintiffs some exclusive privileges for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by the defendants will infringe it. In the first place, it is not an exclusive right to transport passengers and property over the Hackensack and Passaic rivers, *for there is no prohibition of ferries*, nor is it pretended that *they* would violate the contract." (1 Wall. 149.)

In conclusion I may remark, that I have considered the very ingenious argument made by the complainant's counsel to show that the mode adopted by the defendants for transporting persons and property across the river is not a ferry, but a flying bridge, or a floating bridge, and

hence it is a violation of the franchise of the bridge company. But the single boat, which is made to cross the river by steam-power, is not, in my judgment, a bridge of any kind.

Injunction dissolved.

IMHAEUSER *v.* BUERK.

In the Supreme Court of the United States, 1879.

[*Reported* 102 *U. S.* 647.]

Suit by the holder of letters patent for a watchman's time detector, alleging infringement by the defendant in manufacturing another watchman's time detector.

Mr. Justice Clifford delivered the opinion of the court.

Equivalents may be claimed by a patentee of an invention consisting of a combination of old elements or ingredients, as well as of any other valid patented improvement, provided the arrangement of the parts composing the invention is new, and will produce a new and useful result.

Pressure in a machine may be produced by a spring or by a weight; and where that is so, the one is a mechanical equivalent of the other. Cases arise also where a rod and an endless chain will produce the same effect in a machine; and where that is so, the constructor in operating under the patent may substitute the one for the other, and still claim the protection which the patent confers. Exactly the same function in certain cases may be accomplished by a lever or by a screw; and where that is so, the substitution of the one for the other cannot be regarded as invention.

Patentees of an invention consisting merely of a combination of old ingredients are entitled to equivalents, by which is meant that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which, in the same arrangement of the parts, will perform the same function, if it was well known as a proper substitute for the one described in the specification at the date of the patent. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of the patented combination is an infringer if the substitute performs the same function as the ingredient for which it is so substituted, and it appears that it was well known at the date of the patent that it was adaptable to that use.

EDWARD THOMPSON CO. *v* AMERICAN LAW BOOK CO.

In the Circuit Court of the United States, 1903.

[*Reported* 122 *Federal Reporter*, 922.]

Application for injunction by the publishers of the American and English Encyclopædia of Law against the publishers of the Cyclopædia of Law and Procedure, alleging infringement.

Coxe, Circuit Judge. The only act of the defendant which is complained of is this: Lists of all the cases bearing upon a given subject, including the cases found in complainant's books, were put in the hands of the editor chosen to develop that subject. The list of complainant's cases contained authorities not found in the digests. The original reports of these cases were examined by the editor, and, if the cases were found applicable, they were cited by him in support of his article; if not, they were rejected. There is no pretense that a word of the complainant's text has been copied; in fact the defendant's editors were not permitted to open the complainant's books. The list of cases furnished the editor was not copied in the defendant's work and the only use made of the list was as a guide to the volumes where the cases were reported.

Briefly stated, then, the question is this: Is a copyrighted law book infringed by a subsequent work on the same subject where the only accusation against the second author is that he collected all available citations, including those found in the copyrighted work, and, after examining them in text-books and reports, used those which he considered applicable to support his own original text? We are of the opinion that this question must be answered in the negative. The doctrine contended for by the complainant extends the law of copyright beyond its present bounds, and if pushed to its logical conclusion will inflict a far greater injury upon literature than it can ever expect to prevent. If it be held that an author cannot consult the authorities collected by his predecessors, the law of copyright, enacted to promote the progress of science and useful arts, will retard that progress. It will be found upon examining the reported cases that there has been a finding of non-infringement unless it appears that the whole or a part of the copyrighted work has been copied, either in *hæc verba* or by colorable variation.

Unfree Competition. — The design of this chapter does not permit further discussion of this matter. — Ed.

SECTION II. — METHODS OF COMPETITION.

A. Fair Competition.

EVANS *v.* HARLOW.

In the Queen's Bench, 1844.

[*Reported* 5 *Q. B.* 624.[1]]

Case for a libel. The declaration stated that the defendant, Harlow, published of and concerning the plaintiff, Evans, the following false, scandalous, malicious, and defamatory libel; that is to say: —

"This is to caution parties employing steam power from a person" (meaning the plaintiff) "offering what he" (meaning the plaintiff) "calls *Self acting tallow syphons or lubricators*" (meaning the said design, and meaning the said goods and articles which the plaintiff had so sold and had on sale as aforesaid), "stating that he" (meaning the plaintiff) "is the sole inventor, manufacturer, and patentee, thereby monopolizing high prices at the expense of the public. Robert Harlow" (meaning himself the defendant), "brass-founder, Stockport, takes this opportunity of saying that such a patent does not exist, and that he" (meaning the defendant) "has to offer an improved lubricator, which dispenses with the necessity of using more than one to a steam engine, thereby constituting a saving of fifty per cent. over every other kind yet offered to the public. Those who have already adopted the lubricators" (meaning the said design of the plaintiff, and meaning the goods and articles which the plaintiff has so sold and had on sale as aforesaid), "against which *R. H.*" (meaning himself the defendant) "would caution, will find that the tallow is wasted instead of being effectually employed as professed."

By means of which premises the plaintiff was greatly injured in his credit, reputation, and circumstances, and was prevented from selling divers articles made according to the said design, and also divers of the said other articles and goods, which he might and otherwise would have sold, and was thereby prevented from acquiring divers great gains which he might and otherwise would have acquired, and was and is greatly injured in the way of his said trade and business and otherwise. To the plaintiff's damage of, &c.

General demurrer, and joinder. The ground stated in the margin of the demurrer was, "that there is nothing in the alleged libel which is actionable."

Lord Denman, C. J. I am of opinion that the statement complained of does not amount to a libel. It contains no real imputa-

[1] Only the opinion of Lord Denman, C. J., is given; the other justices concurred. — Ed.

tion upon the plaintiff of fraud or misrepresentation. There are indeed words intimating that the plaintiff stated himself to be the sole inventor and patentee of the lubricators, whereas no such patent existed; but it does not appear by the record that the plaintiff had or claimed to have any patent in respect of these. The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be "false, scandalous, malicious, and defamatory" that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action. There is, in this case, a caution given by the defendant against the plaintiff; but it is not against fraud in him; it is simply on account of his selling defective goods. Any one selling the same articles would have as much right to complain as he has. The imputation is only on the goods, and is not ground for an action.

WHITE *v.* MELLIN.

In the House of Lords, 1895.

[*Reported* 1895, *A. C.* 154.[1]]

The respondent was the proprietor of Mellin's food for infants, which he sold in bottles enclosed in wrappers bearing the words "Mellin's Infants' Food." The respondent was in the habit of supplying the appellant with these bottles, which the appellant sold again to the public after affixing on the respondent's wrapper a label as follows: —

"Notice.

"The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1 lb. net weight, at 7½*d.* each, or in 7 lb. packets 3*s.* 9*d.* each. Local agent, Timothy White, chemist, Portsmouth."

The appellant was the proprietor of Vance's food. Discovering this practice, the respondent brought an action against the appellant, claiming an injunction to restrain him, and damages.

At the trial before Romer, J., the plaintiff proved the above facts, and called two analysts and a physician, the result of whose evidence is stated in Lord Herschell's judgment. Briefly, they testified that in their opinion Mellin's food was suitable for infants, especially up to the age of six months, and persons who could not digest starchy mat-

[1] This case is much abridged. — Ed.

ters, and that Vance's food was unsuitable for such beings, nay pernicious and dangerous for very young infants. At the close of the plaintiff's case Romer, J., being of opinion that the label was merely the puff of a rival trader and that no cause of action was disclosed, dismissed the action with costs. The Court of Appeal (Lindley, Lopes, and Kay, L.JJ.) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial.[1]

Lord Herschell, L. C. (after stating the facts). . . . Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbor's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbor's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure — whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans* v. *Harlow*[2] was decided in the year 1844, somewhat over half a century ago, and the fact that no such action — unless it be *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*[3] — has ever been maintained in the courts of justice is very strong indeed to show that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the conclusion that the judgment of the court below cannot be sustained, even assuming the law to be as stated by the learned judges; but inasmuch as the case is one of great importance and some additional color would be lent to the idea that an action of this description was maintainable by the observations in the court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

[1] [1894] 3 Ch. 276. [2] 5 Q. B. 624. [3] L. R. 9 Ex. 218.

Upon the whole, therefore, I think that the judgment of Romer, J., was right and ought to be restored, and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.

AYER *v.* RUSHTON.

In the Common Pleas of New York, 1877.

[*Reported* 7 *Daly*, 9.[1]]

Appeal by the defendant from a judgment in favor of the plaintiffs, granting a perpetual injunction against manufacturing a compound called "cherry pectoral," and using that name upon bottles, labels, or wrappers, and selling any compound by that name, and against imitating the plaintiffs' trade-mark "cherry pectoral." The defendants appealed upon the judgment roll including the findings of fact and law made at special term.

Daly, J. . . . From these findings it appears that both preparations are nearly alike in color, taste, and smell, although defendant has lately altered his compound slightly, in these particulars; that they are both put up in oblong flat clear glass bottles; that plaintiffs' bottles contain about six ounces and defendant's about five and a half ounces; that plaintiffs' bottles are stamped "Ayer's Cherry Pectoral," and defendant's (I assume in the absence of any finding on that point) are not stamped; that plaintiffs' bottles are in a paper wrapper of a deep orange color, and defendant's bottles in a white paper wrapper; that plaintiffs' wrapper bears the printed words (the color of the ink not specified in the finding) "Ayer's Cherry Pectoral for the various affections of the lungs and throat, such as Colds, Coughs, Croup, Asthma, Influenza, Hoarseness, Bronchitis, and incipient consumption, and for the relief of consumptive patients in advanced stages of the disease. Prepared and sold by J. C. Ayer, Lowell, Massachusetts. Price one dollar;" and defendant's wrappers bear the words, printed in red ink, "Cherry Pectoral, Rushton, F. V.," and upon an inside wrapper "Cherry Pectoral," and after some printed words of description and recommendation the words, "For Sale wholesale and retail by Rushton & Co., 11 Barclay Street, New York, formerly of No. 11 Astor House;" that defendant advertised by posters, placards, and signs the words "Cherry Pectoral," for sale at 11 Barclay Street, and placed signs in front of his store with the words "Depot of the Cherry Pectoral Company" thereon; that he conspicuously placed in his store a placard with the words "Ayer's Cherry Pectoral, one dollar. Rushton's Cherry Pectoral, fifty cents; which will you have?" that he instructed his clerks to answer to purchasers who called for Ayer's Cherry Pectoral that his Cherry Pectoral was not Ayer's, and

[1] This case is somewhat abridged. — Ed.

to ask persons inquiring for Cherry Pectoral which they wanted, Rushton's or Ayer's, and to say that Rushton's was much better; that bottles containing said preparations are almost uniformly sold in closed opaque paper wrappers.

We have, then, the undisputed circumstances that defendant has been careful to distinguish his preparation from plaintiffs' by a marked difference in the color of the wrappers, the lettering and the arrangement of the words printed on the wrapper, and by distinctive announcements, the signs in his store, and through his clerks. In fact he seems to have taken precautions to prevent the two compounds from being confounded in the eyes of purchasers; and to prevent purchasers being misled or deceived into buying his medicine under the impression that it was plaintiffs' medicine.

Judgment reversed, and new trial ordered.

CHOYNSKI *v.* COHEN.

In the Supreme Court of California, 1870.

[*Reported* 39 *Cal.* 501.]

Crockett, J. The defendant's motion to set aside the default taken against him for a failure to answer was properly denied. The excuse given in his affidavit for his omission is fully denied by the counter affidavit of the plaintiff.

The only question which remains to be considered is whether or not the complaint states a sufficient cause of action to support the judgment. If the complaint exhibits no cause of action, even a judgment by default will be reversed on appeal. *Abbe* v. *Marr*, 14 Cal. 210.

The action is to recover damages for a violation of the plaintiff's trade-mark, and to restrain the use of it in the future. The complaint alleges that in 1863 the plaintiff established a book, periodical, and stationery store in San Francisco, and gave to his place of business the name of "Antiquarian Book Store," by which name it has ever since been known; that this name was placed upon his sign, stamped upon all articles sold by him, and used in his correspondence; that he advertised by that name in newspapers, and used it in his business transactions generally. The grievance complained of is, that the defendant has set up a rival establishment under the name of the "Antiquarian Book and Variety Store." It is plain that the plaintiff could not acquire any exclusive right to use as a trade-mark the terms "book store" separated from the word "antiquarian." Terms in common use to designate a trade or occupation cannot be exclusively appropriated by any one. Otherwise, only one person would have the right to designate his place of business a "book store," "tinner's shop," "drug store," "hotel," etc. It must, therefore, depend

upon the effect of the word "antiquarian," as used in connection with the words "book store," whether or not the plaintiff has acquired an exclusive right to the use of these words as a trade-mark. The word "antiquarian," as applied to a book store, can have no other meaning or effect than to indicate to the public that the proprietor deals in a certain class of books, to wit: ancient books, or books pertaining to antiquity. Any one reading the sign "Antiquarian Book Store" over the door would naturally expect to find there for sale either ancient books, or books treating on subjects connected with antiquity.

In any other sense the word "antiquarian" could have no significance as applied to a book store. In other words, it indicates only that a certain class of books are sold there. It could not, by even a forced construction, be made to signify that the plaintiff's business had been long established, and was of an ancient origin; for the complaint informs us that the business was established in 1863, and that it had the name of the "Antiquarian Book Store" from the beginning. It is plain that the object of the plaintiff in the use of the word "antiquarian" was simply to indicate that a particular class of books was sold there, precisely in the same sense that the words "Law Book Store," or "Medical Book Store," or "Divinity Book Store" would indicate that law, medical, or religious works were for sale. If we are correct in this interpretation of the words, it is obvious the plaintiff could no more appropriate them as a trade-mark than could a dry goods dealer the words "French Silk Store," or a dealer in hats the words "Felt Hat Store," or a merchant the words "Ladies' Shoe Store," in which cases the words employed would simply notify the public that a particular class of merchandise, as contradistinguished from other merchandise of the same general description, was for sale there. In all such cases, the words employed are but an advertisement that the proprietor deals in a certain class of goods; and it would be a somewhat startling proposition to announce that the first shoe merchant who puts over his door the words "Ladies' Shoe Store" acquires the exclusive right to use these words as a trade-mark. In the case of *Falkinburg et al.* v. *Lucy*, 35 Cal. 52, this court had occasion to examine, with much care, the principles which underlie this case; and without repeating here the argument to be found in the decision of that case, it will suffice to say that upon reason and authority, not less than upon the principles decided in the case referred to, we are satisfied the plaintiff had no right to appropriate the words "Antiquarian Book Store" as a trade-mark; and, consequently, that the complaint contained no cause of action.

Judgment reversed and cause remanded, with an order to the District Court to dismiss the action.

PARSONS *v.* GILLESPIE.

In the House of Lords, 1898.

[*Reported* 1898, *A. C.* 239.[1]]

The action was brought by the appellants to obtain an injunction to restrain the respondents from applying to any preparation not being of the appellants' manufacture the term "Flaked Oatmeal," or from selling as "Flaked Oatmeal" any preparation not being of the appellants' manufacture, and for an account of profits or damages.

Lord Hobhouse. . . . The plaintiffs then must show either that the term "Flaked Oatmeal" is not part of the common stock of language in the sense that it is not a term of description, but is of an arbitrary or fanciful nature invented by the plaintiffs which the inventor may claim to have appropriated; or they must show that the term, being originally a description of the article itself, has come in practice to denote goods made by the plaintiffs. To both these points the plaintiffs have carefully addressed themselves. They maintain that the expression "Flaked Oatmeal" does not properly describe their goods or those of the defendants, but is an artificial expression fit for appropriation by any one who has hit upon it.

Now, nobody can look at Exhibit A without seeing that the word "Flaked" is a correct description. The oats have been only partially reduced to powder, and are presented in small flattened morsels like flakes of snow. The term is one in common use for food grains or other vegetable substances so treated by rolling or crushing, such as "flaked rice," "flaked barley," "flaked tapioca," "flaked cocoa," and so forth. But then it is said that the article is not "meal" because it is not ground to powder. Whether the word "meal" would by etymology or in the very strictest use of language be applicable to that which has passed through the mill, but is only partially reduced to powder, is a point as to which their Lordships think that no nice inquiry need be made. It is a natural and obvious term to use for oats so treated — one which everybody would accept at once as appropriate enough; and probably everybody who breakfasted off porridge made from such a material would think and say that he was eating oatmeal porridge.

Then it is contended that the product of the defendants is not oatmeal, and that their adoption of an inappropriate name shows an intention of trading on the reputation acquired by the plaintiffs. It seems to their Lordships that the name as applied to the defendants' product is strictly appropriate; for they do reduce the oats to powder, which is afterwards steamed, rolled, and so flaked. The plaintiffs have been reduced to contend on this point that because the defendants take away some 5 per cent. of the finest powder the rest is not oat-

[1] This case is abridged. — Ed.

meal; and further that to roll or flake oatmeal is impossible. To support these two contentions they brought several witnesses in the court below; but the court rightly gave no weight to the evidence, which has been little insisted on here.

Then has there been any such secondary use of the term as to identify it with the plaintiffs' manufacture? To prove that there has been, the plaintiffs call a number of grocers who say that when customers asked for "Flaked Oatmeal" they supplied the plaintiffs' goods. That was a matter of course during the five or six years for which nobody except the plaintiffs purported to sell goods under that name. One witness, a miller, says in terms that between 1892 and the beginning of 1896 the words "Flaked Oatmeal" had got to mean the plaintiffs' manufacture. That seems to their Lordships somewhat slender evidence to prove such a general association of the name of the product with the producer as to entitle the plaintiffs to say that the use of the name by another is an encroachment on their rights.

But supposing the evidence sufficient on this point, it falls far short of showing that the proceedings of the defendants are such as to cause confusion between their goods and those of the plaintiffs. There is no evidence that any buyer has got the defendants' goods when he desired to have those of the plaintiffs; nor that any seller has made confusion between the two. As for external resemblance of the packages or labels, it has been shown before with reference to the trademark that there is nothing of the kind except in the use of the two disputed words. In fact, the defendants could hardly have done more to show that the articles came from different makers.

The result is that in their Lordships' judgment the defendants have done no more than they had a right to do in taking appropriate words of ordinary description to indicate the article which they make and sell, and that their action is not calculated to pass off their manufacture as that of the plaintiffs, and is not proved in point of fact to have done so. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

PASSAIC PRINT WORKS *v.* ELY & WALKER DRY GOODS CO.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, 1900.

[*Reported* 105 *Fed.* 163.]

THIS case was determined below on a demurrer to the plaintiff's petition which was sustained, and a final judgment was entered against the Passaic Print Works, the plaintiff below, it having declined to plead further. The plaintiff's petition contained the following allegations: That the plaintiff was a corporation organized under the laws

of the State of New Jersey, and engaged in the manufacture of prints or calicoes at Passaic, in that State. That prior to February 25, 1899, it had been engaged for more than fifteen years in the manufacture of prints or calicoes, and by careful management of its business had earned a reputation of manufacturing a high class of such goods. That it sold its goods, through its selling agents, to jobbers or wholesale dealers throughout the United States, who in turn sold the same to the retail trade. That the city of St. Louis, Mo., was one of the markets in which its prints or calicoes were sold at wholesale, and that it had a large and prosperous trade in that city; that among the goods by it manufactured and sold were four brands of calicoes known as "Trouville Mourning Prints," "Central Park Shirtings," "Elmora Fancy Prints," and "Ramona Fancy Prints," all of which were of a kind largely purchased by jobbers in the St. Louis market, being well suited to the retail trade tributary thereto. That its selling agents had fixed the price for said brands of calicoes for the season of 1899 as follows: For the Trouville mourning prints, 3½ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Central Park shirtings, 3½ cents a yard, less a discount of 5 per cent. and 2 per cent.; for the Elmora fancy prints, 4½ cents per yard, less a discount of 10 per cent. and 2 per cent.; and for the Ramona fancy prints, 4 cents per yard, less a discount of 5 per cent. That at the date aforesaid the blank cloth from which such calicoes were made was selling at 2½ cents per yard, and that the price above specified for the finished product was its price at Passaic, N. J., without the addition of any freight. It was further alleged that prior to February 25, 1899, the plaintiff had received orders for a large amount of the several kinds of prints aforesaid at the prices above specified from several large wholesale dealers doing business in the city of St. Louis, and "that on or about the 25th day of February, 1899, the said defendants (to wit, the Ely & Walker Dry Goods Company *et al.*), combining and conspiring among themselves and with others to the plaintiff unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular in the name of the said defendant corporation to be issued and sent out to the retail trade tributary to St. Louis, which said circular was in words and figures following; that is to say: 'Ely & Walker Dry Goods Co. We beg to call your attention to the following items at prices that cannot be replaced, and request you to order promptly if interested, to secure first selection of styles. Prices for all items subject to change without notice, and orders accepted only for stock on hand.'" Then followed a long list of various brands of cloth, with a specification of the prices at which the various brands would be sold, and among them the following: "Trouville mourning prints, as long as they last, 3¼; Central Park and Boat Club shirting prints, as long as they last, 2⅞; Elmora and Ramona fancy prints, as long as they last, 3½." It was next averred

that the plaintiff had not sold to the defendant corporation or to either of the individual defendants any of the aforesaid prints or calicoes of its manufacture for a period of about one year prior to February 25, 1899; that it had never sold to said defendants any Elmoras or Ramonas; that, if said defendant had any of said last-mentioned prints, it had purchased them at second-hand; that as it was informed and believed the defendants had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in its circular the words "as long as they last"; and that the price named in said circular for the aforesaid four brands of prints of its manufacture was less than the price charged by the plaintiff for said prints, it having universally charged for said prints for delivery in the spring of 1899 the several prices therefor heretofore specified. It was next averred that the effect of the aforesaid circular was to advertise to the retail trade tributary to the city of St. Louis that the four brands of calicoes aforesaid of the plaintiff's manufacture could be purchased at a less price from the defendant corporation than they could be from other jobbers in the city of St. Louis to whom the plaintiff had sold large quantities thereof, and to cause said other jobbers to either cancel their orders, or to compel the plaintiff to make a rebate on the price of its goods in order that other jobbers might meet the prices so specified in the defendant's circular, and to break up, injure, and destroy the sale and trade in such prints in the St. Louis market and in the country tributary thereto, except at greatly reduced prices. It was also alleged, but on information and belief, that the quotations aforesaid in the defendant's circular were made for the purpose of injuring and destroying the plaintiff's trade in the manner last stated, and that in consequence of the issuance of said circular the plaintiff had lost profits on sales which it otherwise might have made to the amount of $10,000, and had been further damaged by having to change the name of its goods and by having their identity lost to the amount of $20,000, and had also been further damaged by the malicious acts complained of to the amount of $20,000; making its total loss $50,000, for which sum it prayed judgment.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The complaint filed in the lower court, the substance of which has been stated, shows by necessary intendment that when the circular of the defendant company was issued it had in stock a limited quantity of the four brands of calico of the plaintiff's manufacture which are therein described. The circular stated, in substance, that the defendant had such calicoes in stock, and the complaint did not deny that fact, but admitted it by averring that "the defendant corporation had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in the circular after the name of the goods the words, 'as long as they last.'" Moreover, the owner

of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind of species of property for sale. The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is *damnum absque injuria*. We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act, and rendered the same unlawful, when, but for the motive of the actor, it would have been clearly lawful. It is common learning that a bad motive — such as an intent to hinder, delay, and defraud creditors, by virtue of St. 13 Eliz. c. 5, and possibly by the rules of the common law — will render a conveyance or transfer of property void which, but for the bad motive, would have been valid. So, also, one who sets the machinery of the law in motion without probable cause, and for the sole purpose of injuring the reputation of another, or subjecting him to loss and expense, is guilty of an unlawful act which would have been lawful but for the improper motive. And one who, by virtue of his situation, has a qualified privilege to make defamatory statements concerning another, may be deprived of the benefit of that privilege by proof that it was not exercised in good faith, but in pursuance of a malicious intent to injure the person concerning whom the defamatory statement or statements were made. Poll. Torts (Webb's ed.) pp. 331–335, and cases there cited. There is also some authority for saying that one who maliciously (that is, with intent to obtain some personal benefit at another's loss or expense) induces another to break his contract with a third party thereby commits an actionable wrong if special damage is disclosed, although the act done would have been lawful if the wrongful motive had been absent. *Lumley* v. *Gye*, 2 El. & Bl. 216; *Bowen* v. *Hall*, 6 Q. B. Div. 333; *Walker* v. *Cronin*, 107 Mass. 555. And see Poll. Torts (Webb's ed.) pp. 668–673. Aside from cases of the latter kind, it is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right. Or, as has sometimes been said, "when an act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive." The question as to how far and under what circumstances a bad purpose will render an act actionable which, considered by itself, and without reference to the purpose which prompted it, is lawful, has been so much discussed since the decision in *Allen* v. *Flood*, [1898] 1 App. Cas. 1, that it would be profitless to indulge in further comment. It has been well observed that it would be dangerous to the peace of

society to admit the doctrine that any lawful act can be transformed *prima facie* into an actionable wrong by a simple allegation that the act was inspired by malice or ill will, or by any improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated, — that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful.

In the brief filed in behalf of the plaintiff in error it is suggested finally that the complaint may be sustained on the ground that it states a good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff, but we think it quite obvious that the complaint was not framed with a view of stating a cause of action of that nature, and that it is insufficient for that purpose. It does not give the name of any person or corporation with whom the plaintiff had a contract for the sale of its prints which was subsequently broken in consequence of the wrongful acts of the defendant. Neither does it show that it had accepted any orders for goods which the jobber was not privileged to cancel at his pleasure. Nor does it allege any special damage incident to the breach of any particular contract. In view of all the allegations which the complaint contains it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in issuing it was to occasion loss or inconvenience to the plaintiff.

We are of opinion that the complaint did not state a cause of action, as the trial court held, and the judgment below is therefore affirmed.

WALSH *v.* DWIGHT.

In the Supreme Court of New York, 1899.

[*Reported* 40 *App. Div. N. Y.* 513.[1]]

Ingraham, J. Upon the trial of this action the complaint was dismissed upon the ground that it did not state facts sufficient to constitute a cause of action, and from the judgment entered upon such dismissal the plaintiffs appeal. Upon this appeal the facts alleged in the complaint must be taken as established, and it must be determined whether upon such facts, as alleged, the plaintiffs were entitled to a verdict. The complaint alleges that the plaintiffs, who are doing business in the city of New York as manufacturers of and dealers in saleratus and soda, which are articles of common use for the support of life and health, had expended large sums of money in advertising their business throughout the State of New York and elsewhere; had been to great expense in introducing their goods on the market; had, prior to January 1, 1896, built up a large and lucrative business, and had prepared plates and wrappers for the various brands of goods used by the jobbers and general dealers in the trade to whom the plaintiffs supplied the said goods; that prior to January 1, 1896, the defendants had been engaged in the manufacture and sale of saleratus and soda and had built up a large trade in what was known on the market as "Dwight's Cow Brand Saleratus and Soda," and that the said articles under the said name had come to be well known and in great demand throughout the country, though substantially of the same grade and quality as those sold by the plaintiffs; that the plaintiffs had, prior to January 1, 1896, been supplying jobbers and the trade generally with the said articles at prices considerably lower than those charged for the articles manufactured and sold by the defendants, and thereby had been enabled to make large sales of their commodities; that the defendants, knowing this and with intent to injure the plaintiffs, destroy, restrain, and prevent competition, and for the purpose of advancing the prices of the said articles, and contrary to the statute in such case made and provided, did, shortly before and on or about the 1st day of January, 1896, and at other times, wrongfully and unlawfully make and enter into contracts with large numbers of the jobbers and dealers throughout the State of New York and elsewhere, wherein and whereby these defendants undertook and agreed to pay to the said parties quarterly, one half cent per pound on all purchases from said defendants of the said Cow Brand Saleratus and Soda, in consideration of the said parties undertaking and agreeing not to sell, or to permit any person connected with them, or under their control, to sell Dwight's Cow Brand Saleratus and Soda at less than the basis of five and one half cents per pound in one pound

[1] This case is somewhat abridged. — Ed.

packages in boxes, or four cents per pound in bulk in kegs, free on board in New York city; other packages in proportion; "(jobbers outside of New York city to add one-eighth of a cent per pound to the invoice prices for freight, which price was a fictitious and exorbitant price caused by extensive and extravagant advertising, the benefit of which accrued only to said defendants), and further undertaking and agreeing not to sell any saleratus or soda in bulk or in boxes under their own private or other brands at less price than Dwight's Cow Brand;" and that, by reason of the said wrongful and unlawful contracts and combinations of the said defendants, restraining and preventing competition and creating a monopoly in the said articles, the business of these plaintiffs was utterly destroyed, and they were wholly prevented from competing with the defendants or making any sales of their goods, and were injured to their damage in the premises in the sum of $50,000.

It is not alleged that the defendants had made any contracts with the customers of the plaintiffs, or with any others than those who were the defendants' regular customers or persons regularly dealing with them, or that they had induced any of the plaintiffs' customers to break any existing contract with the plaintiffs. The right of action appears to be based solely upon the illegality of the contracts made between the defendants and their customers or persons dealing with them; and the plaintiffs ask to recover from the defendants the damages which they claim to have sustained because, by reason of the alleged illegal contracts made between the defendants and their customers, the defendants' customers refused to purchase the plaintiffs' goods.

Assuming, for the purpose of this argument, — a question, however, which we do not determine, — that a contract made by a firm engaged in the manufacture and sale of an article of commerce with those dealing with the firm, which is illegal or prohibited by law, would give a cause of action to any third party engaged in the same business, having no contractual relation with either of the parties to the contract alleged to be illegal, the illegality of the contract alleged must be established before there could be any cause of action. There is, however, nothing in the contract alleged in the complaint to have been made by the defendants which prevents the jobbers and dealers from purchasing or selling the goods of others than the defendants. The defendants simply offered to parties purchasing their goods to make a reduction in the price of the goods sold, in consideration of the purchasers agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price than that at which they agreed to sell the defendants' goods. It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them at such price as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell

to others upon condition that the vendees in selling at retail should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturers to charge a particular price for the articles which he sells in his business, such an agreement is not illegal as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturer of other articles from selling their product to any one who is willing to buy. There is nothing to prevent an individual from selling any property that he has at any price which he can get for it. Nor is there any reason why an individual should not agree that he will not sell property which he owns at the time of making the agreement, or which he thereafter acquires, at less than at a fixed price; and certainly a contract of this kind is not one which exposes the parties to it to any penalty, or subjects them to an action for damages by those whose business such a contract has interfered with.

We think, therefore, that no cause of action was alleged in the complaint, and the judgment is affirmed with costs.

FAIR COMPETITION. — Cases bearing upon fair competition are cited in the appropriate footnotes to Unfair Competition for the purpose of better comparison. — ED.

B. Unfair Competition.

(1) *The Customer Under Contract.*

HART *v.* ALDRIDGE.

In the King's Bench, May 3, 1774.

[*Reported in Cowper*, 54.]

This came before the court on a case reserved upon the following question: Whether under the circumstances of this case the plaintiff was entitled to recover? It was an action of trespass on the case for enticing away several of the plaintiff's servants, who used to work for him in the capacity of journeymen shoemakers. The jury found that Martin and Clayton were employed as journeymen shoemakers by the plaintiff, but for no determinate time, but only by the piece, and had, at the time of the trespass laid, each of them a pair of shoes unfinished; that the defendant persuaded them to enter into his service, and to leave these shoes unfinished, which they accordingly did.

Mr. Darwell, for the plaintiff, stated it to be a question of common law, and that the only point for the opinion of the court was, "whether a journeyman was such a servant as the law takes notice of?" In support of which proposition he insisted that a journeyman is as much a servant as any other person who works for hire or wages; that neither in reason nor at common law is there any distinction between a servant in one capacity or another, and that the injury of seduction is in all cases the same, though the recompense in damages may be different. To show that an action lay at common law for taking a servant out of his master's service, he cited Brooke Abr. tit. *Action sur le case*, pl. 38; 11 Hen. IV., fol. 23, pl. 46. In Fitzherbert, 168 D, it is laid down that "if a man take an infant or other out of another's service, he shall be punished, although the infant or other were not retained." In Brooke, tit. Lab. p. 21, a distinction is taken between the taking a servant out of his master's service and the procuring him to depart or retaining him after a voluntary departure, being apprised of his first retainer: in the two last of which cases an action on the case is the proper remedy; in

the former, trespass at common law. But he insisted that in no case had there ever been a distinction taken with respect to the time for which a servant might be hired; nor indeed before the stat. 5 Eliz. c. 4, was any precise time necessary, the object of which statute was very different from the question before the court. He pressed the argument *ab inconvenienti*, stating that it would be of great detriment to the town, where the whole trade was in a great measure carried on by this sort of servant. That the verdict had found the defendant to be apprised of the retainer of the servants, it being in proof that he had desired them to leave their work then in hand unfinished.

Mr. Willes, contra. The single question is, whether the enticing away a journeyman shoemaker, who is hired to make a single pair of shoes, is such an injury to his master as that an action will lie for it. Now the jury have found that there was no hiring for any determinate time, but only by the piece: if so, they could not be the plaintiff's servants; for the term "journeyman" does not import that they belong to any particular master.

Lord Mansfield interrupted him. The question is, whether saying that such a one is a man's journeyman, is as much as to say that he is such a man's servant; that is, whether the jury, by finding him to be the plaintiff's journeyman, do not *ex vi termini* find him to be his servant. A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.

What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master; but the gist of the present action is that they were attached to this particular master.

Aston, J. It is clear that a master may maintain an action against any one for taking and enticing away his servant, upon the ground of the interest which he has in his service and labor. And even supposing, as my lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant *quoad hoc*, and though the seducer and enticer

is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Justice WILLES and Mr. Justice ASHHURST concurred.

Per Curiam. Let the *postea* be delivered to the plaintiff.

BLAKE *v.* LANYON.

IN THE KING'S BENCH, APRIL 25, 1795.

[*Reported in* 6 *Term Reports*, 221.]

THE second count in the declaration stated that the plaintiff, who was a currier, had hired and retained W. Hobbs to be his servant and journeyman, &c., and that Hobbs, against the will of the plaintiff, departed and left the service of the plaintiff, &c., and then and there went to the defendant; yet the defendant, well knowing Hobbs to be the servant of the plaintiff, and to have been and to be so retained, hired, and employed by the plaintiff, &c., but contriving, &c., "did then and there receive and harbor the said W. Hobbs, and did then and there retain, keep, and employ the said Hobbs in his (defendant's) said service, and wholly refused to deliver him to the plaintiff his master," although requested, &c., and unlawfully detained, entertained, and kept the said Hobbs, so then being the servant and journeyman of the plaintiff, in his (the defendant's) service, &c., whereby, &c. At the trial at the last Launceston assizes it appeared that Hobbs, who was retained by the plaintiff to work by the piece, left the plaintiff's service on a dispute between them, the plaintiff having beaten him; that at the time of his departure he had some work in hand; that he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff; but that, in the course of a few days afterwards, the defendant having been apprised by the plaintiff that Hobbs was his servant and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work. This Hobbs refused, and the defendant continued him in his service. It was objected on behalf of the defendant that the action could not be supported on the second count, because it either imported that the defendant had retained Hobbs in his service, knowing him to be the servant of the plaintiff, which was not established in proof, or that he merely continued Hobbs in his service after he had notice of Hobbs's engagement with the plaintiff, for

which no action could be maintained, it appearing that the defendant did not know that Hobbs was the plaintiff's servant at the time he first employed him. But Lawrence, J., before whom the cause was tried, overruled the objection, saying that the plaintiff might recover upon the second count if the jury were of opinion that the defendant continued to employ Hobbs after he knew that Hobbs was the plaintiff's servant. The jury having given a verdict for the plaintiff,

Gibbs now renewed his objection, stating that great inconveniences would result from a determination against the defendant, for that, in such a case, a person engaged in a great manufacture might be deprived of the benefit of the service of a journeyman whom he had retained to do a particular piece of work, not knowing at the time of hiring that the journeyman was under any engagement with any other master, before the servant had finished his work, and at a moment when the materials then in work might be totally spoiled if left in an unfinished state.

Sed per Curiam. An action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away. Here no fault could be imputed to the defendant for taking Hobbs into his service in the first instance, because then he had no notice of Hobbs's prior engagement with the plaintiff; but, as soon as he had notice of that fact, he ought to have discharged him. A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service. *Rule refused.*

LUMLEY *v.* GYE.

In the Queen's Bench, Trinity Term, 1853.

[*Reported in* 2 *Ellis & Blackburn*, 216.]

Crompton, J.[1] The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before

[1] The statement of case and arguments of counsel are omitted. — Ed.

the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred; and the question for our decision is, Whether all or any of the counts are good in substance?

The effect of the two first counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and *had become and was* the dramatic artiste of the plaintiff for reward to her: and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be

contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. . . .[1]

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of

[1] The learned judge here discussed and approved of Blake *v.* Lanyon. — ED.

action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. . . .[1]

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. *Cowling* is not tenable, or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, *with a malicious intent to ruin a rival trader,* goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action.[2] In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant; and it

[1] The rest of the opinion on this point is omitted. — Ed.

[2] See note (4) to Skinner *v.* Gunton, 1 Wms. Saund. 230.

would seem unjust, and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. *Cowling* on this part of the case seem well worthy of attention.

Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services *during the period for which she had so contracted*, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

Erle, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than of those hiring, are not numerous; but

still they seem to me sufficient to show that the principle has been recognized. In Winsmore *v.* Greenbank it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In Green *v.* Button [1] it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. Sheperd *v.* Wakeman [2] is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In Ashley *v.* Harrison [3] and in Taylor *v.* Neri [4] it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in Bird *v.* Randall [5] is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my

[1] 2 C. M. & R. 707.
[2] 1 Sid. 79.
[3] 1 Peake's N. P. C. 194; s. c. 1 Esp. N. P. C. 48.
[4] 1 Esp. N. P. C. 386.
[5] 3 Burr. 1345.

judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service is necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

WIGHTMAN, J.[1] It was contended, for the defendant, that an action is not maintainable for inducing another to break a contract, though the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party, and not the consequence of the malicious persuasion of the party charged; which ought not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged, that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule, and are not to be extended; and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended, for the plaintiff, that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract, into which he has entered, and by which refusal the plaintiff has sustained an injury; and, though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such action was maintainable; and the authority of Lord Chief Baron Comyns was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the *injuria*, and the *damnum;* but it is contended that the *damnum* is neither the natural nor legal consequence of the *injuria*, and that, consequently, the action is not maintainable, as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant. And the case of Vicars *v.* Wilcocks,[2] which though it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by Lord Chief Justice Tindal in Ward *v.* Weeks,[3] that the damage in that case, as well as in Vicars *v.* Wilcocks,[2] was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorized com-

[1] Only a part of the opinion of WIGHTMAN, J., is given. — ED.

[2] 8 East, 1.

[3] 7 Bing. 211, 215.

munications made by those to whom the words were uttered by the defendants. The distinction is taken in Green *v.* Button,[1] in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff, by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case, that, as the persons in whose custody the goods were, were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff; but the court held the action to be maintainable, though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause, and the damage accruing thereby. In Winsmore *v.* Greenbank the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him, during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff, whereby he would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs, and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good, and that it sufficiently appeared that there was both *damnum* and *injuria:* it was *prima facie* an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act; and, as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favor in the present case. It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so; and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of the two cases referred to, of Green *v.* Button [1] and Winsmore *v.* Greenbank, as well as upon general principle, that an action on the case is maintainable. A doubt was expressed by Lord Eldon, in Morris *v.* Langdale,[2] whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage, that, by reason of the speaking of the words, other persons refused to perform their contracts with him; Lord Eldon observing that that was a damage which might be compensated in actions by the plaintiff against such persons. It has, however, been remarked with much force by Mr. Starkie, in his

[1] 2 C. M. & R. 707. [2] 2 Bos. & Pul. 284, 289.

Treatise on the Law of Libel, vol. i. p. 205 (2d edition), that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation to a person who has lost the immediate benefit of the performance of it. The doubt indeed is hardly sustainable on principle; and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable, on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs; as in the case of Newman *v.* Zachary, where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. Upon the whole, therefore, I am of opinion that, upon the general principles upon which actions upon the case are founded, as well as upon authority, the present action is maintainable.

Coleridge, J. It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued;[1] that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Laborers, 23 Edw. III., and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to show, as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavor, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequence: however complete the *injuria*, and whether with malice or without, if the act be after all *sine damno*, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of

[1] Only the opinion of Coleridge, J., on this point is given. It is now generally admitted that this learned judge, although *wrong* on this point, was right in maintaining that the actress was not a servant. — Ed.

the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between the same parties to go to Sierra Leone, and C. urgently and *bona fide* advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted; the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and let C. have persuaded, not *bona fide* but *mala fide* and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is *malitia sine damno*, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion: there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which Lord Kenyon proceeded in Ashley *v.* Harrison.[1] There the defendant libelled Madame Mara; the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill-treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord Kenyon nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a *procuring*. In Winsmore *v.* Greenbank the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice, who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may

[1] 1 Peake's N. P. C. 194; s. c. 1 Esp. N. P. C. 48.

no doubt sometimes be actionable — as in trespass — even where it is used towards a free agent; the maxims, *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of Winsmore *v.* Greenbank seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of Winsmore *v.* Greenbank. A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited,[1] Judge Hankford[2] gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract; if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument *primæ impressionis* is sometimes of no weight. If the cir-

[1] Mich. 11 H. 4, fol. 23 A. pl. 46, 2 E. & B. 255.

[2] William Hankford, Justice of the Common Pleas in 1398, afterwards, in 1414 (1 H. 5), Chief Justice of England.

cumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it *is* important to find that the action has yet never been tried. Now we find a plentiful supply both of text and decision in the case of seduction of servants; and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of Adams *v.* Bafeald [1] and Blake *v.* Lanyon are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay; and this reason is given: "The very act of giving him employment is affording him the means of keeping out of his former service." Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Laborers, to which no reference was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given *mala fide*, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them? According to all legal analogies the *bona fides* of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to

[1] 1 Leon. 240.

the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought? *Judgment for plaintiff.*

CHAMBERS & MARSHALL *v.* BALDWIN.

In the Court of Appeals of Kentucky, 1891.

[*Reported* 91 *Ky.* 121.[1]]

The substance of the cause of action was that plaintiffs had made a contract with one Wise for his crop of tobacco at 5c. per lb. and that thereafter defendants with full knowledge of this contract induced Wise to sell his crop to them at a higher price.

Judge Lewis delivered the opinion of the court.

Upon neither principle nor authority could this action have been maintained if the same thing it is complained appellee did had been done by a person on friendly terms with appellant, Chambers, or by a stranger, though he might have profited by the purchase to the damage of appellants; for, competition in every branch of business being not only lawful, but necessary and proper, no person should or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a preëxisting contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other; nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser. Competition frequently engenders not only a spirit of rivalry but enmity, and if the motive influencing every business transaction that may result in injury or inconvenience to a business rival was made the test of its legality, litigation and strife would be vexatiously and unnecessarily increased, and the sale and exchange of commodities very much hindered.

Demurrer sustained.

[1] This case is abridged. — Ed.

BOWEN *v.* HALL and Others.

In the Court of Appeal, February 5, 1881.

[*Reported in* 6 *Queen's Bench Division*, 333.]

Brett, L. J.[1] The Lord Chancellor agrees with me in the judgment I am about to read, and it is to be taken therefore as the judgment of the Lord Chancellor as well as of myself.

In this case, we were of opinion at the hearing, that the contract was one for personal service, though not one which established strictly for all purposes the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service, that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson, was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained nevertheless the question, whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of Lumley *v.* Gye. If that case was rightly decided, the objection in this case failed. The only question then which we took time to consider was whether the decision of the majority of the judges in that case should be supported in a Court of Error. That case was so elaborately discussed by the learned judges who took part in it, that little more can be said about it, than whether, after careful consideration, one agrees rather with the judgments of the majority, or with the most careful, learned, and able judgment of Mr. Justice Coleridge. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of Ashby *v.* White.[2] If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on

[1] The statement of facts and the dissenting opinion of Lord Coleridge, C. J., are omitted. — Ed.

[2] 1 Sm. L. C. (8th ed.) p. 264.

his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in Vicars *v.* Wilcocks[1] requires this doctrine for its support, it is in our opinion wrong.

We are of opinion that the propositions deduced above from Ashby *v.* White[2] are correct. If they be applied to such a case as Lumley *v.* Gye, the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract, may not be wrongful in law or fact as in the second case put by Coleridge, J.[3] But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as Lumley *v.* Gye, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The technical objections alluded to above have been suggested as the consequences of the judgment in Vicars *v.* Wilcocks.[1] But that judgment when so used or relied on seems to us to be disapproved in the opinions given in the House of Lords in Lynch *v.* Knight,[4] and seems to us when so used to be unreasonable. In the case of Lumley *v.* Gye, and in the present case, the third condition is fulfilled, namely, that the act of the defendant caused an injury to the plaintiff, unless again it can be

[1] 8 East, 1.
[2] 1 Sm. L. C. (8th ed.) p. 264.
[3] *Supra*, 609.
[4] 9 H. L. C. 577.

said correctly that the injury is too remote from the cause. But that raises again the same question as has been just dismissed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. That is stated in all the opinions in Lynch *v.* Knight.[1] The injury is in such a case in law as well as in fact a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognized. It follows that in Lumley *v.* Gye, and in the present case, all the conditions necessary to maintain an action on the case are fulfilled.

Another chain of reasoning was relied on by the majority in Lumley *v.* Gye, and powerfully combated by Coleridge, J. It was said that the contract in question was within the principle of the Statute of Laborers, that is to say, that the same evil was produced by the same means, and that as the statute made such means when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employed with regard to parties standing in a similar relation as also wrongful. If, in order to support Lumley *v.* Gye, it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Coleridge, J., upon the second head of his judgment seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the support of the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine. And we are therefore of opinion that the judgment of the Queen's Bench Division was correct, and that the principal appeal must be dismissed.

Appeal dismissed.

ASHLEY *v.* DIXON.

In the Court of Appeals of New York, 1872.

[*Reported*, 48 *N. Y.* 430.]

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of plaintiffs entered upon a verdict.

The action is brought to recover damages to which plaintiffs claim themselves entitled from the following facts: —

On the 24th of January, 1863, one Edwin L. Patrick, by agreement in writing, contracted to sell and convey to William H. McEachron, plaintiffs' testator, certain premises in Washington county, the deed to be delivered April 1st, and purchase-money paid April 3d, then next: On the 10th of February, 1863, McEachron contracted to sell and convey the premises to defendant; deed to be delivered and pur-

[1] 9 H. L. C. 577.

chase money paid April 1st. Subsequently, defendant, by offering a larger price, induced Patrick not to perform. Upon the 1st day of April, McEachron went to Patrick to tender the money and demand deed, but Patrick was absent; a tender and demand were subsequently made and refused. Defendant made a tender under his contract, and demanded a deed of McEachron April 1st. Upon the 4th of April, Patrick deeded to defendant. Plaintiffs obtained a verdict for $566.58.

EARL, C. If this be treated as an action to recover the purchase price of the real estate which McEachron contracted to sell to the defendant, or as an action to recover the liquidated damages mentioned in the contract, the action must fail, for the reason that McEachron did not perform, and was not able to perform, on his part.

If the action be treated, as it was on the trial, as one to recover damages for a conspiracy between the defendant and Patrick to defraud McEachron out of his contract with Patrick, and to prevent the performance of his contract with the defendant, then the action must fail, because there was not sufficient proof of such a conspiracy, and the motion to nonsuit the plaintiffs should have been granted. There was no evidence which would warrant the jury to find that Patrick absented himself from home, or refused to perform his contract with McEachron, at the instigation of the defendant.

But even if defendant had induced Patrick not to perform his contract, that alone would not make him liable to the plaintiffs for damages. He could advise and persuade Patrick not to convey the land, under his contract with McEachron, and could, by offering more, induce him to convey to himself, without incurring any liability to McEachron, so long as he was guilty of no fraud or misrepresentation affecting McEachron. If A. has agreed to sell property to B., C. may at any time before the title has passed induce A. not to let B. have the property, and to sell it to himself, provided he be guilty of no fraud or misrepresentation, without incurring any liability to B.; A. alone, in such case, must respond to B. for the breach of his contract, and B. has no claim upon or relations with C. While, by the moral law, C. is under obligation to abstain from any interference with the contract between A. and B., yet it is one of those imperfect obligations which the law, as administered in our courts, does not undertake to enforce. But if C. makes use of any fraudulent misrepresentations, as to B., to induce A. to violate his contract with him, then there is a fraud, accompanied with damages, which gives B. a cause of action against C.; as if C. fraudulently represents to A. that B. had failed or absconded, or had declared his intention not to sell to B., and thus induces A. to sell to another.

Here there is no proof of any fraudulent representations made by defendant to induce Patrick to violate his contract with the plaintiffs.

Hence, I can conceive of no theory, upon the facts as they appear before us, upon which this action can be maintained.

The judgment must be reversed and new trial granted, costs to abide event.

Judgment reversed.

ANGLE *v.* CHICAGO, ETC. RAILWAY CO.

IN THE SUPREME COURT OF THE UNITED STATES, 1894.

[*Reported* 151 *U. S.* 1.[1]]

THIS was an appeal from a decree of the circuit court of the United States for the Western District of Wisconsin dismissing plaintiff's bill. The bill was filed on the 23d of May, 1888, against the Chicago, Portage and Superior Railway Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and the Farmers' Loan and Trust Company.

MR. JUSTICE BREWER.

That which attracts notice on even a casual reading of the bill — the truth of all the allegations in which must be taken, upon this record, to be admitted by the demurrer — is the fact that, while Angle was actually engaged in executing a contract which he had with the Portage Company — a contract whose execution had proceeded so far that its successful completion within the time necessary to secure to the Portage Company its land grant was assured, and when neither he nor the Portage Company was moving or had any disposition to break that contract or stop the work — through the direct and active efforts of the Omaha Company the performance of that contract was prevented, the profits which Angle would have received from a completion of the contract were lost to him, and the land grant to the Portage Company was wrested from it.

That there were both wrong and loss is beyond doubt. And as said by Croke, J., in *Baily* v. *Merrell*, 3 Bulst. 94, 95, "damage without fraud gives no cause of action; but where these two do concur and meet together, there an action lieth." The Portage Company held a land grant worth four millions of dollars. It had contracted for the construction of its road, such construction to be completed in time to perfect its title to the land. The contract had been so far executed that its full completion within the time prescribed was assured. Except through some wrongful interference, it was reasonably certain that everything would be carried out as thus planned and arranged.

At this time the Omaha Company, which was a rival in some respects, and which had located a line parallel and contiguous to the line of the Portage Company, interferes, and interferes in a wrongful way. It bribes the trusted officers of the Portage Company to transfer the entire outstanding stock into its hands, or at least place it under its control. Being thus the only stockholder, it induces the general man-

[1] This case is much abridged. — ED.

ager to withdraw the several engineering corps, whose presence was necessary for the successful carrying on of the work of constructing the road; to give such notice as to result in the seizure of all the tools and supplies of the contractor and the company, and the dispersion of all laborers employed. To prevent any action by the faithful officers of the Portage Company, it wrongfully obtains an injunction tying their hands. In the face of this changed condition of affairs the company, which had negotiated with the Portage Company and was ready to advance it money, surrendered the one hundred thousand of the bonds, and abandoned the arrangement. By false representations to the legislature as to the facts of the case, it persuaded that body to revoke the grant to the Portage Company and bestow the lands upon itself.

That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defence were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company. Reversed, and the case remanded with instructions to overrule the demurrer.

Unfair Competition by Inducement of Breach of Contract. — *Exchange Co.* v. *Gregory*, 1896, 1 Q. B. 147; *Angle* v. *R. R.*, 151 U. S. 1; *Heaton Co.* v. *Dick*, 52 Fed. 667; *R. R.* v. *McConnell*, 82 Fed. 65; *May* v. *Woods*, 172 Mass. 11; *Detz* v. *Winfree*, 80 Tex. 400; *accord Boyson* v. *Thorne*, 98 Cal. 578; *Chambers* v. *Baldwin*, 91 Ky. 158; *Land Co.* v. *Commission Co.*, 139 Mo. 439; *Ashley* v. *Dixon*, 48 N. Y. 430 *contra*. — Ed.

(2) *The Customer Not Under Contract.*

(*a*) FRAUD.

BLOFELD *v.* PAYNE AND ANOTHER.

IN THE KING'S BENCH, JANUARY 12, 1833.

[*Reported in* 4 *Barnewall & Adolphus,* 410.]

CASE. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman, C. J., at the sittings in London after last term, it appeared that the defendants had obtained some of the plaintiff's wrappers, and used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' hones were of inferior quality? but he stated to them that even if the defendants' hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' hones were not inferior to his. Leave was reserved to move to enter a nonsuit.

Barstow now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' hones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITTLEDALE, J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule.

TAUNTON, J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made this use of them, entitles the plaintiff to some damages.

PATTESON, J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN, C. J., concurred. *Rule refused.*

STONE AND OTHERS *v.* CARLAN AND OTHERS.

IN THE NEW YORK SUPERIOR COURT, 1850.

[*Reported in* 13 *Law Reporter*, 360.]

THE important facts of this case appear in the opinion of the court.

J. Graham, for defendants.

H. A. Mott and *J. F. Brady*, for plaintiff.

CAMPBELL, J. A motion is made for an injunction restraining the defendants from using the names "Irving Hotel," "Irving House," "Irving," &c., upon their coaches and upon certain badges worn by defendants upon their arms and hats. The complainants have an agreement with the proprietors of the Irving House, in this city, under which they are permitted to use the name of such proprietors, and the name of their hotel, upon their coaches and the badges of their servants; the complainants paying therefor a stipulated sum, and having also entered into bonds for the faithful discharge of these duties. All the porters are engaged in carrying passengers and their baggage to and from the hotels, boats, railroad depots, &c.

It was well remarked by the Master of the Rolls, in Croft *v.* Day, that "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud; and fraud may be practised against him by means of a name, though the person

practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." I entirely concur in the foregoing views. The question is, whether the defendants have committed a fraud. I cannot doubt that their intention was to mislead, and to induce travellers to believe that they were servants of the proprietors of the Irving House. This is a large and popular hotel, well known in the country, and many a traveller may wish to resort to it on his arrival in this city, who, at the same time, may not know whether the carriages of the proprietors are painted red or white, or whether the exact designation is that of the Irving House or Irving Hotel. Such traveller may wish to intrust himself and his baggage to the servants of the hotel, feeling that, in doing so, he would be protected against loss or damage by the responsibility of the proprietors. Now, in this case, it can hardly be doubted but that the object of the defendant was to induce the belief on the part of the travellers that they were the servants of this hotel. To induce such belief, it was not necessary that the resemblance of all carriages and badges should be complete. From the very circumstances of the case, it would not be necessary to have a perfect resemblance, in order to commit even a gross fraud. It is not necessary to go, in this case, the length of the ordinary cases of trade-marks, though this case might come within the rules of those cases. (See Coates *v.* Holluck.[1]) The false pretences of the defendants would, I think, necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic, and attentive. The employment is open to them, but "they must not dress themselves in colors, and adopt and bear symbols," which belong to others. I had some doubt, at the time of the argument, whether the complaint should not have been made by the proprietors of the Irving House; but, on further reflection, think that the suit is well brought. The plaintiffs are the real parties in interest. It is possible that, owing to the general liability of the proprietors, as innkeepers, for the loss of the property of guests, the proprietors might also be entitled to an injunction restraining the defendants from holding themselves out as the servants of the hotel.

An injunction must issue, as prayed for, against all the defendants.

Fraud by Imitation of Dress. — *Knott* v. *Morgan*, 2 Keene, 213; *Blofield* v. *Payne*, 4 B. & Ad. 410; *Aver* v. *Goodwin*, 30 Ch. D. 1; *Coates* v. *Merrick*, 149 U. S. 562; *Sawyer* v. *Hubbard*, 32 Fed. 388; *Fairbanks Co.* v. *Bell Co.*, 77 Fed. 869; *Dennison Co.* v. *Thomas Co.*, 94 Fed. 651; *Hires* v. *Consumers' Co.*, 100 Fed. 809; *Awl Co.* v. *Awl Co.*, 168 Mass. 154; *Williams* v. *Spenser*, 25 How. Pr. 365.

CROFT *v.* DAY.

In Chancery, 1843.

[*Reported* 7 *Beavan*, 84.[1]]

[A BLACKING manufactory had long been carried on under the firm name of Day & Martin at 97 High Holborn. A person by the name of Day with one Martin set up the same trade at 90½ Holborn Hill. The new concern marked their product Day & Martin, upon labels of similar style.]

THE MASTER OF THE ROLLS. The accusation which is made against this defendant is this: — that he is selling goods, under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manufactory which belonged to the testator in this cause. It has been very correctly said that the principle in these cases is this, — that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud and a very gross fraud. I stated, upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others.

Injunction granted.

BOULNOIS *v.* PEAKE.

In Chancery, 1868.

[*Reported L. R.* 13 *Ch. D.* 513 *note*.]

THE plaintiffs were sellers of carriages by auction and on commis-

FRAUD AS TO THE SELLER. — *Croft* v. *Day*, 7 Beav. 84; *Jurton* v. *Jurton*, 42 Ch. D. 128; *Brewing Co.* v. *Brewing Co.*, 1898, 1 Ch. 539; *Sawyer Co.* v. *June Co.*, 163 U. S. 109; *Pillsbury* v. *Pillsbury Co.*, 64 Fed. 841; *Chaney* v. *Hoxie*, 143 Mass. 502; *Meyers* v. *Buggy Co.*, 54 Mich. 215; *Hall's Appeal*, 60 Pa. 158.

sion, and carried on their business in a part of the Baker Street Bazaar (Baker Street and King Street), where they had been established for forty years, and had standing room for 600 carriages. They had always used the title of "Carriage Bazaar," and headed their bills with these words, and the allegation in the bill was that no other establishment in Baker Street or London was known as "The Carriage Bazaar."

The defendant, in January, 1868, took the house No. 24 Baker Street, and before opening it as a shop and standing place for carriages announced it on a board as a "Carriage Repository." In February, 1868, he had put up as the title of his shop the words in large letters "New Carriage Bazaar," and in his advertisements had used the same title with the addition "Opposite Madame Tussaud's."

The plaintiffs moved for an injunction. Evidence was adduced of mistakes and confusion between the establishment of the plaintiffs and that of the defendant from the adoption of this title "Carriage Bazaar."

Gifford, V. C., said that the principle in these cases was not that the plaintiff had any property in the particular title, but that he had a right to prevent others from personating his business by using any such description as would lead customers to suppose they were trading with the plaintiffs. The defendant had failed to satisfy the court that he had any other motive in what he had done than that of seeking to gain an unfair advantage over the plaintiffs. Why did he change the title "Carriage Repository" into "Carriage Bazaar?" The plaintiffs had established their case, and there must be an injunction.

REDDAWAY *v.* BANHAM.

In the House of Lords, 1896.

[*Reported* 1896, *A. C.* 199.[1]]

[The appellant, Reddaway, began in 1879 the manufacture of "Camel Hair Belting." It had a large sale at home and abroad. The respondent, Banham, began the manufacture of camel hair belting in 1891. The yarn of which the belts of each party were made consisted chiefly of camel's hair. The questions left to the jury with their answers were as follows: —]

Q. 1. Does "Camel Hair Belting" mean belting made by the plaintiffs, as distinguished from belting made by other manufacturers? *A.* Yes. — *Q.* 2. Or does it mean belting of a particular kind without reference to any particular maker? *A.* No. — *Q.* 3. Do the defendants so describe their belting as to be likely to mislead purchasers,

[1] This case is much abridged. — Ed.

and to lead them to buy the defendants' belting, as and for the belting of the plaintiffs? *A.* Yes. — *Q.* 4. Did the defendants endeavor to pass off their goods, as and for the goods of the plaintiffs, so as to be likely to deceive purchasers? *A.* Yes.

Lord Morris. My Lords, I have felt some difficulty in concurring as I do in the judgment proposed to be given in favor of the appellants by your Lordships, for it establishes, and in my opinion for the first time, the proposition that a trader is not permitted to merely tell truthfully and accurately the material of which his goods are made. I find myself coerced, however, to a conclusion against the respondents by the finding of the jury, which amounts to this, "that camel hair belting had become so identified with the name of the appellants Reddaway as that camel hair belting had in the market obtained the meaning of Reddaway's belting;" and there was sufficient evidence given at the trial to support that finding of the jury. That finding establishes as a fact that the use of the words "camel hair belting" simpliciter deceives purchasers, and it becomes necessary for the respondents to remove that false impression so made on the public. That, to my mind, is obviously done when the respondents put prominently and in a conspicuous place on the article the statement that it was camel hair belting manufactured by themselves. Having done so, they would, as it appears to me, fully apprise purchasers that it was not Reddaway's make, by stating that it was their own. A representation deceiving the public is and must be the foundation of the appellants' right to recover; they are not entitled to any monopoly of the name "camel hair belting" irrespective of its deceiving the public, and every one has a right to describe truly his article by that name, provided he distinguishes it from the appellants' make. In this case the respondents did not so distinguish it because they omitted to state that it was their own make. Consequently I concur in the motion which has been made.

Order appealed from reversed, with costs here and below: Declared that judgment ought to be entered for the plaintiffs in the Queen's Bench Division for an injunction restraining the defendants and each of them from using the words "camel hair" as descriptive of or in connection with belting manufactured by them or either of them, or belting (not being of the plaintiffs' manufacture) sold or offered for sale by them or either of them without clearly distinguishing such belting from the belting of the plaintiffs; with this declaration judgment of Collins, J., in all other respects restored: Cause remitted to the Queen's Bench Decision.

Fraud by Infringement of Trade Designation. — *Crawshay* v. *Thompson*, 4 M. & G. 357; *Johnson* v. *Ewing*, 7 A. C. 219; *Witherspoon* v. *Currie*, L. R. 5 H. L. 508; *Reddaway* v. *Banham*, 1896, A. C. 199; *Birmingham Co.* v. *Powell*, [1897] A. C. 710; *Walker* v. *Alley*, B. Grant, Ch. 366; *Canal Co.* v. *Clark*, 13 Wall. 11; *Hilson Co.* v. *Foster*, 80 Fed. 896; *Mossler* v. *Jacobs*, 68 Ill. App. 571; *Waltham Co.* v. *U. S. Co.*, 173 Mass. 85; *Saunders* v. *Jacobs*, 20 Mo. App. 96.

WALTHAM WATCH CO. *v.* UNITED STATES WATCH CO.

In the Supreme Court of Massachusetts, 1899.

[*Reported* 173 *Mass.* 85.]

Bill in equity, filed October 15, 1890, and amended September 22, 1898, to restrain the use of the word "Waltham" on watches made by the defendant, to the detriment of the plaintiff's business as a manufacturer of watches in Waltham. Hearing before Knowlton, J., who, with the consent of the parties, reported the case for the consideration of the full court. The facts appear in the opinion.

Holmes, J. This is a bill brought to enjoin the defendant from advertising its watches as the "Waltham Watch" or "Waltham Watches," and from marking its watches in such a way that the word "Waltham" is conspicuous. The plaintiff was the first manufacturer of watches in Waltham, and had acquired a great reputation before the defendant began to do business. It was found at the hearing that the word "Waltham," which originally was used by the plaintiff in a merely geographical sense, now, by long use in connection with the plaintiff's watches, has come to have a secondary meaning as a designation of the watches which the public has become accustomed to associate with the name. This is recognized by the defendant so far that it agrees that the preliminary injunction, granted in 1890, against using the combined words "Waltham Watch" or "Waltham Watches" in advertising its watches, shall stand and shall be embodied in the final decree.

The question raised at the hearing, and now before us, is whether the defendant shall be enjoined further against using the word "Waltham," or "Waltham, Mass.," upon the plates of its watches without some accompanying statement which shall distinguish clearly its watches from those made by the plaintiff. The judge who heard the case found that it is of considerable commercial importance to indicate where the defendant's business of manufacturing is carried on, as it is the custom of watch manufacturers so to mark their watches, but nevertheless found that such an injunction ought to issue. He also found that the use of the word "Waltham," in its geographical sense, upon the dial, is not important, and should be enjoined.

The defendant's position is that, whatever its intent, and whatever the effect in diverting a part of the plaintiff's business, it has a right to put its name and address upon its watches; that to require it to add words which will distinguish its watches from the plaintiff's in the mind of the general public is to require it to discredit them in advance; and that, if the plaintiff by its method of advertisement has associated the fame of its merits with the city where it makes its wares instead of with its own name, that is the plaintiff's folly, and

cannot give it a monopoly of a geographical name, or entitle it to increase the defendant's burdens in advertising the place of its works.

In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other. *Boston Ferrule Co.* v. *Hills*, 159 Mass. 147, 149, 150. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense.

It is true that a man cannot appropriate a geographical name, but neither can he a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. Yet a color in connection with a sufficiently complex combination of other things may be recognized as saying so circumstantially that the defendant's goods are the plaintiff's as to pass the injunction line. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154, 156. So, although the plaintiff has no copyright on the dictionary or any part of it, he can exclude a defendant from a part of the free field of the English language, even from the mere use of generic words unqualified and unexplained, when they would mislead the plaintiff's customers to another shop. *Reddaway* v. *Banham*, [1896] A. C. 199. So the name of a person may become so associated with his goods that one of the same name coming into the business later will not be allowed to use even his own name without distinguishing his wares. *Brinsmead* v. *Brinsmead*, 13 Times L. R. 3. *Reddaway* v. *Banham*, [1896] A. C. 199, 210. See *Singer Manuf. Co.* v. *June Manuf. Co.*, 163 U. S. 169, 204; *Allegretti Chocolate Cream Co.* v. *Keller*, 85 Fed. Rep. 643. And so, we doubt not, may a geographical name acquire a similar association with a similar effect. *Montgomery* v. *Thompson*, [1891] A. C. 217.

Whatever might have been the doubts some years ago, we think that now it is pretty well settled that the plaintiff, merely on the strength of having been first in the field, may put later comers to the trouble of taking such reasonable precautions as are commercially practicable to prevent their lawful names and advertisements from deceitfully diverting the plaintiff's custom.

We cannot go behind the finding that such a deceitful diversion is the effect and intended effect of the marks in question. We cannot go behind the finding that it is practicable to distinguish the defendant's watches from those of the plaintiff, and that it ought to be done. The elements of the precise issue before us are the importance of indi-

cating the place of manufacture and the discrediting effect of distinguishing words on the one side, and the importance of preventing the inferences which the public will draw from the defendant's plates as they now are, on the other. It is not possible to weigh them against each other by abstractions or general propositions. The question is specific and concrete. The judge who heard the evidence has answered it, and we cannot say that he was wrong.

Decree for the plaintiff.

MEDICAL TEA CO *v.* KIRSCHSTEIN.

In the Circuit Court of the United States, 1900.

[*Reported* 101 *Fed. Rep.* 580.]

Lacombe, Circuit Judge. In view of the decision of the case against Wilhelmina Weber in the Eastern district, complainant is not entitled to any relief which will interfere with the labels or manner of packing the goods complained of. The further representation, however, of the defendant, when selling, that such tea is "Weber's tea," is an independent act not considered in the former suit. He may sell the packages which Wilhelmina is allowed to put up, and which represent the goods as "genuine imported Alpine herb tea, manufactured by F. G. Weber & Co.," and may repeat that representation orally; but, when he further represents the contents to be "Weber's tea," his statements, as the affidavits show, tend to produce a confusion of goods, against which the public should be protected. The prayer for relief seems to be broad enough to warrant an injunction against selling any preparation, not manufactured by complainant, upon the representation that it is "Weber's tea." To that extent the motion is granted; in all other respects, it is denied.

WAMSUTTA MILLS *v.* FOX.

In the Circuit Court of the United States, 1892.

[*Reported* 49 *Fed. Rep.* 141.]

In equity. Bill in equity by the Wamsutta Mills against Moses

Fraud by Substitution of Goods. — *Barnet* v. *Leuchars*, 13 L. T. 495; *Saxlehner* v. *Eisener*, 88 Fed. 61; *Medical Tea Co.* v. *Kirchstein*, 101 Fed. 580; *Avery v. Merkle*, 81 Ky. 75; *Stonebrecker* v. *Stonebrecker*, 33 Md. 252; *Moroe* v. *Smith*, 13 N. Y. S. 708. — Ed.

Fox, to restrain defendant from advertising and selling articles as made from muslin manufactured by defendant, which were, in fact, made from inferior muslin. Motion for temporary injunction. Granted.

SHIPMAN, District Judge. This is a bill in equity to restrain the defendant from advertising and selling shirts, made from inferior cotton shirtings, as made from Wamsutta cotton, upon the ground that the cotton shirting manufactured by the plaintiff, and known as and generally called "Wamsutta cotton," has acquired a well-known, widely extended, and high reputation, and extensive sales throughout the country; and that the sale of an inferior article under that name, and the untrue assertion by advertisements, and otherwise, that the inferior cotton shirting is Wamsutta cotton, injure the plaintiff's reputation, the good will, and the profits of its business. The present hearing is upon a motion for temporary injunction.

The allegations of the bill in regard to the high and general reputation of the cotton shirting manufactured by the plaintiff, and generally called "Wamsutta," are not denied. It appears from the affidavits that the defendant is a large retail dry-goods merchant in Hartford, whose business is divided into departments, and that one of his employes is the head of the men's furnishing goods department. In accordance with a not unusual custom among merchants of this class, the prices of the odd lots on hand were reduced after the 1st of January, and were advertised, by an extensive advertisement, to be sold at these low prices during the week beginning January 4, 1892. Among men's furnishing goods there were advertised "Men's Laundered Shirts, Wamsutta cotton, 67c., value $1.00. Men's Night-Shirts, Wamsutta cotton, 47c., value 75c." This part of the advertisement was prepared by the head of said department, without the knowledge of Fox, who did not read it. Affidavits are produced from three persons, who bought at the defendant's store, in response to this advertisement, four night-shirts and one laundered shirt, all which were expressly represented by the salesman in attendance to be Wamsutta cotton. The clerk said he would warrant the laundered shirt to be Wamsutta cotton, and, at the request of the buyer, inserted "Wam." in the bill of the goods. These shirts were all made of greatly inferior goods, which were not the manufacture of the plaintiff. The defendant's affidavit states that he knew nothing of the untrue representations, that they were made without his orders, that his attention was first called to their existence by the motion papers in this case, when he forthwith ordered the sales to be stopped, and that his general orders to his clerks have been to exercise all possible care, and not to misrepresent the origin of any article. The head of the department says, in his affidavit, that there were laundered shirts on hand, stamped "Wamsutta muslin," which were made of Wamsutta cotton, and were marked down to 67 cents, and that the advertisement referred to these shirts, and to no others; and that, in the advertisement in regard to the night-shirts, he made a mistake, innocently, and without

intention to misrepresent; that the sales of these shirts were stopped on January 16th, when the papers were served. Between the 2d and 16th of January, 25 laundered shirts were sold, some of them made of Wamsutta cotton, and 31 night-shirts were sold. The conduct of these persons cannot be defended. The motion is granted.

PONTEFACT *v.* ISENBERGER.

IN THE CIRCUIT COURT OF NEW YORK, 1900.

[*Reported* 106 *Federal Reporter*, 499.]

WHEELER, District Judge. This cause has been submitted upon an agreed statement of facts. It shows that the plaintiffs have the sole right to the use of the trade-mark "Golden Wedding," as applied to the whisky of their production, and that the defendant has refilled the plaintiffs' barrels carrying the trade-mark, to palm off his product as that of the plaintiffs. The plaintiffs are, therefore, entitled to a decree according to the terms of the stipulation. Decree for plaintiffs for $350, according to stipulation.

SINGER COMPANY *v.* JUNE COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, 1896.

[*Reported* 163 *U. S.* 169.[1]]

BILL for an injunction restraining defendants from manufacturing sewing machines like those of the plaintiffs and selling them as "Singer" machines.

MR. JUSTICE WHITE, after stating the facts: —

The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent.

The result, then, of the American, the English, and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this

[1] This case is abridged. — ED.

name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact.

The right to use the word "Singer," which caused the imitative infringement in the device, being lawful, it is plain that the infringement only resulted from the failure to plainly state along with the use of that word the source of manufacture, and therefore this branch of the question is covered by the same legal principle by which we have determined the other.

Decree requiring unmistakable specification of the manufacturer.

COATS *v.* MERRICK THREAD COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, 1893.

[*Reported* 149 *U. S.* 562.[1]]

MR. JUSTICE BROWN, after stating the case:

The controversy between the two parties then is reduced to the single question whether, comparing the two designs upon the main or upper end of the spool, there is such resemblance as to indicate an intent on the part of defendants to put off their thread upon the public as that of the plaintiffs, and thus to trade upon their reputation. There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising, and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.

It will be seen that in both devices there is a paper label, circular in form, much smaller than the head of the spool, containing, in black letters upon a gilt ground, the name of the manufacturer, the number of the thread, and the words "Best Six Cord," arranged in circular

[1] This case is abridged. — ED.

form to correspond with the shape of the label. Around this label in each case is a peripheral border of natural wood, having the number of the thread embossed upon such periphery. The differences are less conspicuous than the general resemblance between the two. At the same time they are such as could not fail to impress themselves upon a person who examined them with a view to ascertain who was the real manufacturer of the thread. Plaintiffs' label contains the words "J. & P. Coats, Best Six Cord" in a gilt band around the border, and in the centre the symbol "200 Yds." and the number of the thread. Defendants' label contains the words "Merrick Thread Co.," and the number of their thread in the gilt band upon the border, and in the centre the words "Best Six Cord," enclosing a star. The periphery of defendants' spool is also embossed with four stars, instead of the loops of the plaintiffs, as well as the number of the thread.

Upon the whole, we think the plaintiffs have failed to prove a case of unfair competition, or any illegal attempt of the defendants to impose their thread upon the public as that of the plaintiffs; that with the right to use the black and gold label as other manufacturers have and continue to use it, and with the same right to use the embossed numerals which the plaintiffs have, we think they have taken all the precautions which they were bound to take to prevent a fraudulent imposition of their thread upon the public, and that the decree of the court below dismissing the bill should, therefore, be

Affirmed.

NEW YORK & R. CEMENT CO. *v.* COPLAY CEMENT CO.

In the Circuit Court of the United States, 1890.

[*Reported* 44 *Federal Reporter*, 276.]

Defendants sold cement which they denominated "Anchor Rosendale Cement," though made in Lehigh County, Pa. Complainants manufacture cement in the town of Rosendale, N. Y., along with 15 or 20 other manufacturers. Bill for injunction.

Bradley, Justice (after stating facts): —

Much evidence has been taken by the parties on this controverted question; but the view of the case which we have taken obviates the necessity of examining this evidence. Though it be conceded that the name "Rosendale Cement" is understood by the public as designating the place where it is made and comes from, and that the defendants untruly call their cement by that name, the question still remains whether they can be prosecuted therefor, at the suit of a private party, who is only one of the many who manufacture cement at Rosendale, and truly denominate their cement "Rosendale Cement." Would not the allowance of such an action be carrying the doctrine of liability for unfair competition in business too far? The counsel

for the complainants frankly concedes that the principle for which he contends would enable any crockery merchant of Dresden or elsewhere, interested in the particular trade, to sue a dealer of New York or Philadelphia who should sell an article as Dresden china when it is not Dresden china. It seems to us that this would open a Pandora's box of vexatious litigation. A dry-goods merchant, selling an article of linen as Irish linen, could be sued by all the haberdashers of Ireland, and all the linen dealers of the United States. No doubt the sale of spurious goods, or holding them out to be different from what they are, is a great evil, and an immoral, if not an illegal, act; but unless there is an invasion of some trade-mark, or trade-name, or peculiarity of style, in which some person has a right of property, the only persons legally entitled to judicial redress would seem to be those who are imposed upon by such pretences.

GLOBE-WERNICKE CO. *v.* FRED MACY CO.

CIRCUIT COURT OF APPEALS, UNITED STATES, 1903.

[119 *Federal Reporter*, 696.[1]]

SEVERNS, J.: It is impossible to admit the claim of the appellant to the extent of its pretensions. The very idea of distinguishing implies that it cannot be done by such universal characteristics as belong to other goods of the kind, and which the general public have the undoubted right to use. Thus, the public have the right to make bookcases of any size. From the nature of the requirements they must have resemblance in form, dimensions, and appearance. So no one can have the exclusive privilege of locating them in sections, one above another or end to end, nor in making them of any kind of wood or metal as he chooses, nor in the style or in the finish of his work, unless it is peculiar and out of the ordinary. Upon the claim made for the appellant, it would be impossible, without invading the complainant's right, to construct and sell a bookcase having the most desirable characteristics.

HUGHES *v.* McDONOUGH.

SUPREME COURT, NEW JERSEY, 1881.

[*Reported* 43 *New Jersey*, 459.]

DECLARATION that plaintiff, a blacksmith, shod a mare for one Van Riper; that defendant maliciously to injure plaintiff did mutilate the work done upon the mare of said Van Riper, without knowledge

[1] This case is abridged. — ED.

of the said Van Riper, by loosing a shoe which was recently put on by the said plaintiff, so that if the mare was driven, the shoe would come off easily, and thus make it appear that the said plaintiff was an unskilful and careless horseshoer and blacksmith, and that the said mare was not shod in a good and workmanlike manner, and thus deprive the said plaintiff of the patronage and custom of the said Van Riper."

The second count charges the defendant with driving a nail in the foot of the horse of Van Riper, after it had been shod by the plaintiff, with the same design as specified in the first count.

The special damage laid was the loss of Van Riper as a customer.

Argued at June term, 1881, before Beasley, Chief Justice, and Justices Scudder, Knapp and Reed.

For the plaintiff in error, *W. B. Guild, Jr.*

For the defendant, *S. Kalisch.*

The opinion of the court was delivered by

Beasley, C. J. The single exception taken to this record is, that the wrongful act alleged to have been done by the defendant does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was, that the wrong was done to Van Riper; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him, and that, consequently, the damages of the plaintiff were too remote to be made the basis of a legal claim.

But this contention involves a misapplication of the legal principle, and cannot be sustained. The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. The act had a twofold injurious aspect: it was calculated to injure both Van Riper and the plaintiff; and as each was directly damnified, I can perceive no reason why each could not repair his losses by an action.

The facts here involved do not, with respect to their legal significance, resemble the juncture that gave rise to the doctrine established in the case of Vicars *v.* Wilcocks.[1] In that instance the action was for a slander that required the existence of special damage as one of its necessary constituents, and it was decided that such constituent was not shown by proof of the fact that as a result of the defamation the plaintiff had been discharged from his service by his employer before the end of the term for which he had contracted. The ground of this decision was that this discharge of the plaintiff from his employment was illegal, and was the act of a third party, for which the defendant

[1] 8 East, 1.

was not responsible, and that, as the wrong of the slander became detrimental only by reason of an independent wrongful act of another, the injury was to be imputed to the last wrong, and not to that which was farther distant one remove. In his elucidation of the law in this case, Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment, that it "was a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." The class of cases to which this authority belongs, rests upon the principle that a man is responsible only for the natural consequences of his own misdeeds, and that he is not answerable for detriments that ensue from the misdeeds of others. But this doctrine, it is to be remembered, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties; for, in such instances, damage is regarded as occasioned by the wrongful cause, and not at all by those which are not wrongful. Where the effect was reasonably to have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. This principle is stated, and is illustrated by a reference to a multitude of decisions in Cooley on Torts, 70, *et seq.* . . .

The principles thus propounded must have a controlling effect in the decision of the question now before this court, as they decisively show that the damage of which the plaintiff complained was not, in a legal sense, remote from the wrongful act. What, in point of substance, was done by the defendant, was this: he defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by word spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for the slander; and, plainly, no reason exists why the law should not afford a similar redress when the same injury has been inflicted by disreputable craft. It is admitted upon the record that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely, in the natural order of events, to proceed from such misconduct, but that it was the design of the defendant to produce such result by his act. Under such circumstances it would be strange indeed if the party thus wronged could not obtain indemnification by an appeal to the judicial tribunals.

Unfair Competition by Fraud. — *Howe* v. *McKernan*, 30 Beav. 547; *Chapleau* v. *La Porte*, 16 Rap. Que. 189; *Lawrence Co.* v. *Tenn. Co.*, 138 U. S. 537; *Evans* v. *Von Laer*, 32 Fed. 153; *Jewell* v. *Bigelow*, 66 Ill. 452; *Marsh* v. *Billings*, 7 Cush. 322; *Rice* v. *Manley*, 66 N. Y. 82. And add lists following.

(*b*) DISPARAGEMENT.

(*a*) OF PERSON.

JONES *v.* LITTLER.

IN THE EXCHEQUER, JANUARY 16, 1841.

[*Reported in* 7 *Meeson & Welsby*, 423.]

SLANDER. The declaration stated that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer the false, scandalous, malicious, and defamatory words following: "I'll" (meaning that he, the defendant, would) "bet £5 to £1, that Mr. Jones" (meaning the plaintiff) "was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Whereupon the said Henry Pye then asked the defendant, "Do you mean to say that Mr. Jones, brewer, of Rose Hill" (meaning and describing the plaintiff), "has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The jury having returned a verdict for the plaintiff, the court granted a rule to show cause why there should not be a new trial, on a suggestion that the learned judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not.

PARKE, B. It is quite clear that this rule ought to be discharged, for the only ground on which it was granted has failed, inasmuch as the learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact that in the conversation in question the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of Stanton *v.* Smith[1] is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were

[1] 2 Ld. Raym. 1480.

all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from Ayre *v.* Craven and Doyley *v.* Roberts.[1] In the latter of those cases the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of Stanton *v.* Smith, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in Doyley *v.* Roberts.

Alderson and Rolfe, BB., concurred. *Rule discharged.*[2]

SECOR *v.* HARRIS.

Supreme Court, New York, September, 1854.

[*Reported in* 18 *Barbour*, 425.]

Motion by the plaintiff for a new trial, upon a bill of exceptions.

F. U. Fenno, for the plaintiff. *W. B. Hawes*, for the defendant.

Mason, J. This is an action for slander. Upon the trial of the cause the plaintiff proved the following words, which were also alleged in the complaint: "Doctor Secor killed my children." "He gave them teaspoonful doses of calomel, and they died." "Dr. Secor gave them teaspoonful doses of calomel, and it killed them; they did not live long after they took it. They died right off, — the same day." The plaintiff was proved to be a practising physician, and the evidence shows that he had practised in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and

took them from the consideration of the jury. These words, spoken of the plaintiff as a physician, are actionable *per se*, whatever may be said upon the question, whether they impute a criminal offence. They do not impute a criminal offence, unless there is evidence, arising from the quantity of the calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of such tender years full teaspoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children, in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question, whether the defendant did not intend to impute to the plaintiff, by these words, a criminal offence. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them teaspoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine, as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. Starkie on Slander, 100, 110, 115, 10, 12; Martyn *v.* Burlings;[1] Bacon's Abr. title Slander, B; Watson *v.* Van Derlash;[2] Tutler *v.* Alwin;[3] Smith *v.* Taylor;[4] Sumner *v.* Utley.[5] I am aware that it was held, in the case of Poe *v.* Mondford,[6] that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in Foot *v.* Brown,[7] that it was not actionable to say of an attorney or counsellor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of Poe *v.* Mondford is repudiated in Bacon's Abr. as authority, and cases are referred to as holding a contrary doctrine (vol. ix. pages 49, 50). The cases of Poe *v.* Mondford, and of Foot *v.* Brown, were reviewed by the Supreme Court of Connecticut, in the case of Sumner *v.* Utley,[8] with most distinguished

[1] Cro. Eliz. 589.
[2] Hetl. 69.
[3] 11 Mod. R. 221.
[4] 1 New R. 196.
[5] 7 Conn. R. 257.
[6] Cro. El. 620.
[7] 8 Johns. 64.
[8] 7 Conn. R. 257.

ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held, that words are actionable in themselves, which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskilfulness. To the same effect is the case of Johnson *v.* Robertson,[1] where it was held that the following words spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of Tutler *v.* Alwin,[2] where it was held to be actionable to say of an apothecary, that "he killed a patient with physic." See also 3 Wilson's R. 186; Bacon's Abr. title Slander, letter B, 2, vol. ix. page 49 (Bouv. ed.). The cases of Poe *v.* Mondford and Foot *v.* Brown have been repudiated by the highest judicial tribunal in two of the American States, while the case of Poe *v.* Mondford seems to have been repudiated in England; and I agree with Clinch, J., that the reason upon which that case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskilfulness; and where charges are made against a physician that fall within this class of cases, they are not actionable, without proof of special damages.[3] 7 Conn. R. 257. It is equally true, that a single act of a physician may evince gross ignorance, and such a total want of skill, as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable *per se*. 7 Conn. R. 257. The rule may be laid down as a general one that, when the charge implies gross ignorance and unskilfulness in his profession, the words are actionable *per se*. This is upon the ground that the law presumes damage to result, from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. Starkie on Slander, 581. It was well said by the learned Chief Justice Hosmer, in Sumner *v.* Utley,[4] that, "As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By con-

[1] 8 Porter's R. 486.

[2] 11 Mod. R. 221.

[3] Sumner *v.* Utley, 7 Conn. 257; Garr *v.* Selden, 6 Barb. 416; Rodgers *v.* Kline, 56 Miss. 808; Lynde *v.* Johnson, 39 Hun, 5 *Accord.* — ED.

[4] 7 Conn. 257.

fining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then, the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence; and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies; and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof: Starkie on Slander, 581; in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practise." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the consideration of the jury, and a new trial must be granted; costs to abide the event of the action.

CRIPPEN, J., concurred. SHANKLAND, J., dissented.

New trial granted.

CHARLES HAMON *v.* JOSUÉ JOSUÉ GEORGE FALLE.

IN THE PRIVY COUNCIL, FEBRUARY 7, 8, 1879.

[*Reported in* 4 *Appeal Cases*, 247.]

APPEAL from a judgment of the Royal Court of the Island of Jersey (July 23, 1877).

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:[1] —

The plaintiff in this case is a master mariner holding a certificate from the Board of Trade. The defendant was, when the action was brought, the president of the Jersey Mutual Insurance Society for Shipping, and is sued as the representative of that society. The society is, as its name imports, a mutual insurance society for shipping, and is governed by the rules which were put in as part of the evidence before the court below, and are now before their Lordships. Some of those rules will have to be more particularly considered hereafter, but it is sufficient at present to state that the general course of business of the society seems to be that the different shipowners who become members of it underwrite each other's vessels in a certain proportion, and that the insurances effected are in the nature of time policies for one year.

The action is a peculiar one. The effect of the pleading in the nature of a declaration is as follows: — that the plaintiff holding the position which has been already mentioned, and having been employed as master of certain specified vessels, and in particular of the Dora, which then belonged to the late M. Félix Briard, his services were retained by M. James Sebire, the proprietor of the ship Ulysses; that he was getting ready to take the command of that vessel when he found that the insurance society had intimated to M. Sebire that if the plaintiff were to take command of her, the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution, or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family. And he prayed that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay the damages claimed to the amount of £500.

In the first instance, the society took the proceeding which is set out in the record, which is partly in the nature of a demurrer; but also sets forth the resolutions of the committee under which the telegrams which had passed between them and M. Sebire were sent, and which were in fact the cause of the plaintiff's non-engagement as master of the vessel.

[1] The opinion of the court is somewhat abridged. — ED.

The effect of this pleading was to submit that there was no ground of action. The court, however, considering that the course adopted by the society had caused considerable damage to M. Hamon in preventing him from following his profession as a master mariner; that the resolutions of the committee produced by the defendant contained no *motif* or reason to justify the proceeding which the committee had thought fit to adopt; and that such a proceeding, if adopted — "*sans cause ou raison valable*" — without cause or valid reason, would be an arbitrary and vexatious act, that would give a right of action to the person who was subject to it; decided that the society ought to suffer the consequences of its act, unless it furnished sufficient grounds or motives to justify its conduct. Leave was given to appeal to the full court, the court of greater number; but the defendants have never availed themselves of that permission. Mr. Benjamin has, in argument, fairly admitted that the declaration must be taken to disclose a *prima facie* cause of action; and that the only question is whether the plea or *prétention* which the defendants filed under the last-mentioned order has been proved, and if proved constitutes a valid defence.

That *prétention* is to be found in the record. In substance it pleads that the committee of administration only took the course they did in consequence of the information which they had received from sources respectable in themselves and worthy of belief, and which in the opinion of the committee established that M. Hamon, when in command of the ship Dora, belonging to Messrs. Félix Briard & Co., had been guilty of and had given way to intemperance, and had conducted himself in such a way as not to deserve the confidence of its owners, who had dismissed him from their service; that in those circumstances, the committee not being able to have confidence in M. Hamon, and thinking that an insurance was a purely voluntary act on their part, had decided not to expose the society to the risk of becoming responsible for the fate of a ship which would be placed under the command of a man whom they had reason to believe was addicted to a vice criminal in any case, but still more so in the case of a man holding the position of master of a vessel; that having taken that determination, the committee confined themselves to communicating to M. Sebire, without letting him know in terms the information which they had received on the subject of M. Hamon, whom, so long as they could protect the interests of the society, they had no desire to injure. It further states that in support of their *prétention* the defendants produced the letter from M. Briard, which is to be found in the evidence, and which they say was brought by M. Hamon to the office of the society only a few days before the date of the correspondence between M. Sebire and the committee, and they contend that that letter alone justifies fully the conduct of the society against Hamon, and that it was of a kind and of a nature to inspire doubt with reference to him and distrust of him, and that they cannot be bound to furnish legal proof of the conduct of Hamon whilst he had the command of the vessel *Dora*, but that it sufficed that they

should have reasonable grounds for refusing to place their interest at the risk of the conduct or acts of Hamon.

The effect of the defence thus pleaded is clearly that the defendants acted in good faith and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The finding of the court that the act of the defendants would be arbitrary and vexatious, and that the defendants would be liable for damages unless they could show sufficient motives to justify what they did, points to that conclusion. Their Lordships further think that if the case is to be likened (as in the argument it has been) to an action for defamation it would fall within the rule thus laid down by Mr. Baron Parke in the case of Toogood *v.* Spyring: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." In the present case their Lordships think that the representation made by the society to Sebire was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned.

The plaintiff having been admitted to appeal *in forma pauperis*, there will of course be no order as to costs.

RATCLIFFE *v.* EVANS.

In the Court of Appeal, May 26, 1892.

[*Reported in Law Reports* (1892), 2 *Queen's Bench*, 524.]

Motion to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q. C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the good-will of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons;" that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the "County Herald," circulated in Flintshire and some of the adjoining counties,

and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the "County Herald," certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published *bona fide;* and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff, for £120, with costs.

The defendant appealed.

Bowen Rowlands, Q. C., and *E. H. Lloyd*, for the appellant.

F. Marshall, for the respondent.[1] *Cur. adv. vult.*

The following judgment of the court (Lord Esher, M. R., Bowen, and Fry, L. JJ.), was read by

Bowen, L. J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the "County Herald," a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of dam-

[1] The arguments of counsel are omitted. — Ed.

age was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see Ashby *v.* White.[1] In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage:" Cane *v.* Golding;[2] "damage in fact," "special or particular cause of loss:" Law *v.* Harwood,[3] Tasburgh *v.* Day.[4]

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see Iveson *v.* Moore,[5] Rose *v.* Groves.[6] In this judgment we shall endeavor to avoid a term which, intelligible enough in particular contexts, tends,

[1] 2 Ld. Raym. 938; 1 Sm. L. C. 9th ed. p. 268, *per* Holt, C. J.
[2] Sty. 169.
[3] Cro. Car. 140.
[4] Cro. Jac. 484.
[5] 1 Ld. Raym. 486.
[6] 5 M. & G. 613.

when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business — a falsehood which is not actionable as a personal libel, and which is not defamatory in itself — is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in Iveson *v.* Moore,[1] in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage" — says Pollock, C. B., in Harrison *v.* Pearce,[2] — "it is general damage resulting from the kind of injury the plaintiff has sustained." So in Bluck *v.* Lovering,[3] under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also Ingram *v.* Lawson.[4] Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander,

[1] 1 Ld. Raym. 486.
[2] 32 L. T. (O. S.) 298.
[3] 1 Times L. R. 497.
[4] 6 Bing. N. C. 212.

but from its unauthorized repetition: Ward *v.* Weeks,[1] Holwood *v.* Hopkins,[2] Dixon *v.* Smith.[3] General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable *per se* general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. Evans *v.* Harries[4] was a slander uttered in such a manner. It consisted of words reflecting on an inn-keeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn — a floating and transitory class. The court held that general evidence of the decline of business was rightly receivable. "How," asked Martin, B., "is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?" Macloughlin *v.* Welsh[5] was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see Ashley *v.* Harrison.[6] From libels and slanders actionable *per se*, we pass to the case of slanders not actionable *per se*, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: Law *v.* Harwood.[7] Many such instances are collected in the judgments in Iveson *v.* Moore,[8] where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said — in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim — "damages in the '*per quod*,' where the '*per quod*' is the gist of the action, should be shown certainly and specially." But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may

[1] 7 Bing. 211.
[2] Cro. Eliz. 787.
[3] 5 H. & N. 450.
[4] 1 H. & N. 251.
[5] 10 Ir. L. Rep. 19.
[6] 1 Esp. 50.
[7] Cro. Car. 140.
[8] 1 Ld. Raym. 486.

here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. Hartley *v.* Herring[1] is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: Dixon *v.* Smith,[2] Hopwood *v.* Thorn.[3] The broad doctrine is stated in Buller's Nisi Prius, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: Malachy *v.* Soper. The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: Lowe *v.* Harewood,[4] Cane *v.* Golding,[5] Tasburgh *v.* Day,[6] Evans *v.* Harlow.[7] But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: Janson *v.* Stuart,[8] Lord Arlington *v.* Merricke,[9] Grey *v.* Friar,[10] Westwood *v.* Cowne,[11] Iveson *v.* Moore.[12] In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to

[1] 8 T. R. 130.
[2] 5 H. & N. 450.
[3] 19 L. J. (C. P.) 95.
[4] W. Jones, 196.
[5] Sty. 176.
[6] Cro. Jac. 484.
[7] 5 Q. B. 624.
[8] 1 T. R. 754.
[9] 2 Saund. 412, n. 4.
[10] 15 Q. B. 907; see Co. Litt. 303 d.
[11] 1 Stark. 172.
[12] 1 Ld. Raym. 486.

be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of Hargrave *v.* Le Breton,[1] decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In Hargrave *v.* Le Breton[1] it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press — probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in Riding *v.* Smith can be justified, it must be justified on the ground that the court (rightly or wrongly) believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs. *Appeal dismissed.*

DEAN DUDLEY *v.* RICHARD F. BRIGGS.

In the Supreme Judicial Court, Massachusetts, May 8, 1886.

[*Reported in* 141 *Massachusetts Reports,* 582.]

Tort. Writ dated September 18, 1885. The declaration was as follows: —

"And the plaintiff says that he is, and has been for many years, a compiler and publisher of directories of cities, towns, and counties in

[1] 4 Burr. 2422.

this Commonwealth and elsewhere; that by care, attention, skill, and faithfulness, and after great labor and expense, he had acquired a large number of subscribers among business men and other people, throughout the cities and towns of Bristol County, and elsewhere in this Commonwealth, for 'The Bristol County Directory,' which the plaintiff has compiled and published biennially for many years, and until the acts and doings of the defendant hereinafter complained of; that, at great labor and expense, he had acquired a large and valuable list of advertisers in his said directory, from whom, as well as from the said subscribers to said directory, he obtained a large income, and would have continued to do so, but for the acts and doings of the defendant hereinafter alleged and set forth.

"And the plaintiff says that, according to his usual and ordinary custom in the compilation and publication of the said 'The Bristol County Directory,' he would have compiled and published the same in this year, A. D. 1885, and he made his preparations therefor, but he says that the defendant and his canvassers, and other servants and agents, in order to injure the plaintiff, and to deprive him of the opportunity of compiling and publishing said directory for said year of 1885, and thereafterwards, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise to injure the plaintiff and get gain, profit, and advantage to the defendant, knowingly and wilfully, falsely and fraudulently, pretended and represented to many persons, and particularly to the plaintiff's patrons, the advertisers in said directory and the subscribers thereto throughout said Bristol County, that the plaintiff had gone out of the business of compiling and publishing said directory, that the plaintiff had sold out said business to the defendant, that the said canvassers and the defendant's other servants and agents were compiling the materials for the plaintiff's directory, the same as formerly, and other false and fraudulent representations then and there made, of which the plaintiff is not yet fully informed, and thereby deceitfully and wrongfully induced the plaintiff's said patrons, advertisers, and subscribers, in and throughout said Bristol County, to give to the defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor.

"Whereas, in truth and in fact, the said representations were wholly false and untrue; the plaintiff had neither gone out of the business of compiling and publishing the said directory, as he had done for years before, nor had he sold out to the defendant, nor had he any intention of doing so; nor were the defendant and his canvassers, and other agents and servants, compiling the said directory the same as formerly or for the plaintiff; all of which the defendant, as well as his said canvassers and other servants and agents, well knew. And the defendant did knowingly, wrongfully, injuriously, and deceitfully compile and publish the said 'The Bristol County Directory,' for the year A. D. 1885, and vend and sell the same to the plaintiff's patrons, advertisers, sub-

scribers, and other persons, as aforesaid. And the plaintiff says that thereby he has been prevented from compiling, publishing, and selling his said directory this year, A. D. 1885, as he has always done heretofore; that he has lost the great gains and profits which he would otherwise have made and received from the sale thereof, and from advertisers in and subscribers to said directory, and has been put to great loss and expense in preparing for said compilation and publication, till he learned of the defendant's said act and doings, and thereby he will be hereafter prevented from compiling and publishing said directory except at an increased expense and with diminished profits."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer; and ordered judgment for the defendant. The plaintiff appealed to this court.

J. C. Coombs and *N. U. Walker*, for the defendant.

S. H. Dudley, for the plaintiff.

FIELD, J. The plaintiff in his declaration does not allege that, by the acts of the defendant, he has been deprived of the benefit of any contract he had made, or of any property in existence and in his possession, or that the defendant published his directory for 1885 as a directory prepared and published by the plaintiff; and does not bring his case within such decisions as Lumley *v.* Gye, Marsh *v.* Billings,[1] Thomson *v.* Winchester,[2] Blofeld *v.* Payne, Morison *v.* Salmon,[3] and Sykes *v.* Sykes.[4]

He does not allege that he had any copyright in the previous publications which the publication of the defendant infringed; and the courts of the Commonwealth have no jurisdiction over infringements of copyright. If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this, — that he intended to publish a directory for 1885, whereby he expected to make profits, but, by reason of the acts of the defendant, he abandoned such an intention, and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property. Bradley *v.* Fuller.[5]

An attempt has been made to bring this case within what is called slander of goods, manufactured and sold by another. See Western Counties Manure Co. *v.* Lawes Chemical Manure Co. This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging the plaintiff's business. We think that the declaration does not show that the business of the plaintiff, in publishing a new directory every two years, was a continuous business. The directory to be published in 1885 was to be a new compilation and publication. From the nature

[1] 7 Cush. 322.
[2] 19 Pick. 214.
[3] 2 M. & G. 385.
[4] 3 B. & C. 541.
[5] 118 Mass. 239.

of the book, perhaps this could not well be otherwise. New subscribers and new advertisements were to be obtained. We have been shown no case where it has been held that a false statement that the plaintiff had gone out of business, or sold out his business to the defendant, was an actionable slander of a person in his trade; but upon this we express no opinion. It may be said that such statements tend to injure a man in his business, because they tend to prevent customers from resorting to him for trade, and to injure the value of the good-will of his business. However this may be, the difficulty is in attaching good-will as a valuable thing to the publication every two years of a new directory. Such a directory could be published by anybody. It is perhaps a question of degree whether the publication by the plaintiff had been so frequent and regular that there can be said to be a good-will that would be protected in law. There is no allegation of any continuing contract, express or implied, of subscribing for, or advertising in, the directories, as a publication periodically issued; there is no allegation of any place of business to which customers resorted to purchase directories. Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think that there was any business of publishing a directory for 1885 carried on by the plaintiff, or anything that, for example, could have been sold as a going concern by an assignee in insolvency, if the plaintiff had become an insolvent debtor. The cases upon liability for wrongful interference with the business of another are largely collected in Walker *v.* Cronin; but in that case there was an actual business, with the carrying on of which the defendant wrongfully interfered. The declaration in this case, indeed, alleges that the plaintiff made his preparations for compiling and publishing a directory for 1885, but it does not allege what those preparations were, or that they were anything valuable. The averment that he "has been put to great loss and expense in preparing for said compilation and publication," near the end of the declaration, appears to be a part of the damages.

The plaintiff cites Swan *v.* Tappan;[1] but there the declaration was held insufficient, because there was no allegation of special damage. The declaration in the present case cannot well be distinguished in this respect from the declaration in Swan *v.* Tappan, but we do not deem it necessary to reconsider the decision in that case on this point. There, the plaintiff was actually engaged in selling his book, which had already been printed and put upon the market, and the action was the ordinary action for the malicious disparagement of the goods of another, manufactured and kept for sale.

The plaintiff relies upon Benton *v.* Pratt,[2] which perhaps may be considered as an extreme case. See Randall *v.* Hazelton. In Benton *v.* Pratt, Seagraves and Wilson, at Allentown, had orally agreed to purchase of the plaintiff two hundred hogs, at the market price, if delivered

[1] 5 Cush. 104. [2] 2 Wend. 385.

within three or four weeks, and they had not been previously supplied; and, "about the time for the delivery," the plaintiff was proceeding with his drove of hogs to Allentown for the purpose of delivering to them two hundred hogs. The defendant, by his falsehood and deceit, intentionally prevented the performance of this contract, by persuading Seagraves and Wilson that the plaintiff was not intending to drive his hogs to Allentown, whereby they were induced to buy the hogs of the defendant, instead of buying the hogs of the plaintiff, as they otherwise would have done. The court say, that it was "not material whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not;" but the agreement, if there was an agreement, although not in writing, was an actual offer by Seagraves and Wilson, not revoked, and which they would have performed, and the plaintiff was in the actual possession of the property which Seagraves and Wilson had offered to buy, and was actually proceeding to deliver this property to them, in accordance with their offer.

The fatal objection to the present case is, that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts; but this, upon the principles stated in Bradley *v.* Fuller,[1] and the cases therein cited, is not sufficient to support an action. *Judgment affirmed.*

BOYNTON *v.* SHAW STOCKING CO.

In the Supreme Court of Massachusetts, 1888.

[*Reported* 146 *Mass.* 219.]

Tort for an alleged libel contained in the following words: "Caution: An opinion of Shaw knit hosiery should not be formed from the navy blue stockings advertised as of 'first quality' by Messrs. S. W. Boynton & Co. at 12½ cts., since we sold that firm at less than ten cents a pair some lots which were damaged in the dye-house. [Signed] Shaw Stocking Company, Lowell, May 29, 1886."

At the trial in the Superior Court, before Thompson, J., the plaintiff offered evidence tending to prove the following facts: —

The plaintiff was the proprietor of a dry-goods store, and did a large business in Waltham, under the style of S. W. Boynton & Co., his customers also coming from the surrounding towns and cities. He had for several years purchased stockings manufactured by the defendant. On May 3, 1886, one Guild, who sold goods of the defendant on commission, called at the plaintiff's place of business and

represented that he had a large stock of navy blue first quality Shaw knit stockings to sell, which were in such sizes that the defendant would sell them cheap, as it desired to reduce its very large stock. The plaintiff examined samples of the stock then in Guild's possession, which were first quality navy blue Shaw knit stockings, and, after being assured by Guild that the stock was like the samples and of the very first quality, purchased one hundred dozen pairs. After the receipt of the stockings, and after examining them, the plaintiff caused to be inserted in six issues of "The Charles River Laborer," a weekly paper published in Waltham, and having a large circulation in that place and in surrounding towns and cities, the following advertisement: "Shaw Knit Hose, navy blue, size 8 to 11, first quality goods, at 12½ cts. per pair." Afterwards, the defendant caused the alleged libel to be inserted in six issues of "The Waltham Daily Tribune," a newspaper published in Waltham, and having a large circulation therein and in the surrounding cities and towns.

C. ALLEN, J. An action will not lie for mere disparagement of the plaintiff's goods, without averment and proof of special damage. *Dooling* v. *Budget Publishing Co.*, 144 Mass. 258. But the plaintiff contends that the words used by the defendant contain an imputation upon his character, and that they imply that he was deceiving the public by advertising goods as of first quality which he knew were damaged. The question, therefore, is this: Taking the words in their natural sense, and without a forced or strained construction, do they contain this imputation? If the words may fairly bear that meaning, then the case should have been submitted to the jury; otherwise not. *Twombly* v. *Monroe*, 136 Mass. 464; *Simmons* v. *Mitchell*, 6 App. Cas. 156; *Capital & Counties Bank* v. *Henty*, 7 App. Cas. 741, 744, 771, 772, 790, 793.

We are of opinion that the words, fairly construed, do not bear that meaning, and that, in order to reach such a construction, it is necessary to include something which the defendant did not say, and which its words do not imply. No doubt a case might be imagined where, from peculiar circumstances, — as, for example, from the nature of the article offered for sale, or from the long continued habit of selling goods of a different character or quality from that represented, — it would be a natural inference from a charge otherwise like that which is the subject of this action, that the party was practising fraud or imposition, or was guilty of trickery or meanness. In the present case, such an inference does not naturally arise, and the object of the defendant's advertisement, judging from its language, appears to have been rather to uphold and maintain the character of its goods than to attack the plaintiff's character. The court might properly withdraw the case from the jury. See *Boynton* v. *Remington*, 3 Allen, 397; *Evans* v. *Harlow*, 5 Q. B. 624; *Solomon* v. *Lawson*, 8 Q. B. 823.

Exceptions overruled.

DAVEY *v.* DAVEY.

In the Supreme Court of New York, 1898.

[*Reported* 50 *N. Y. S.* 161.[1]]

Action by Michael Davey against Andrew Davey to recover damages for a libel published by defendant defaming plaintiff's business methods. There was a verdict for plaintiff, and defendant moves for a new trial. Ordered conditionally.

McAdam, J. The law has always been considerate of the reputation of tradesmen (Newell, Defam. [2d ed.] 192; *Harman* v. *Delany*, 2 Strange, 898), and when one publishes of a tradesman or merchant any matter in relation to his calling which, if true, would render him unworthy of patronage, one is liable to an action, it being evident that the tendency of such a publication is to bring the subject thereof into disrepute and cause him injury (*Brown* v. *Smith*, 13 C. B. 596). Such publications are actionable without proof of special damage. *Brown* v. *Smith*, *supra*. The imputation imports damage, and if none is proved the jury may award substantial damages. The gist of the action is malice; yet the malice requisite is simply that implied by the law from the facts which give the right of action. *Hartman* v. *Association* (Com. Pl.) 19 N. Y. Supp. 398; *Lewis* v. *Chapman*, 16 N. Y. 372; *Hamilton* v. *Eno*, 81 N. Y. 116; *Byam* v. *Collins*, 111 N. Y. 143, 19 N. E. 75.

The litigants are brothers. The defendant carried on the grocery and tea business at No. 2295 First Avenue, and the plaintiff thereafter opened a similar business at No. 2331 First Avenue. The defendant threatened that, if the plaintiff opened a rival establishment near the defendant's store, he would break up the business of the plaintiff; and after the latter opened the store the defendant caused to be printed and distributed broadcast 5000 circulars, in which, after eulogistically describing the superiority of his wares and the advantage the public would derive by patronizing him, he said, of and concerning the plaintiff and his business methods, "that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees' with a view to deceive the public, and may sell an inferior article." The words, though cunningly devised and put together, taken in their plain and popular sense, that in which the readers were sure to understand them (*Roberts* v. *Camden*, 9 East, 96), bear the construction that the plaintiff was an unprincipled grocer (Cent. Dict.); that he was dishonest in his business, for he advertised Davey's teas and coffees with a view to deceive the public; and that he sold inferior articles, this being one of the characteristics of unscrupulous traders. While the defendant had the undoubted right to praise his own wares, he had no right to single out the plain-

[1] This case is somewhat abridged. — Ed.

tiff and not only denounce his wares, but, in connection therewith, impugn his business integrity. Such a publication could have but one purpose, namely, to injure the plaintiff in his business, and it is, therefore, clearly libellous *per se.* *Fowles* v. *Bowen*, 30 N. Y. 20; *Moore* v. *Francis*, 121 N. Y. 199, 23 N. E. 1127; *Chenery* v. *Goodrich*, 98 Mass. 224; *Mattice* v. *Wilcox*, 71 Hun, 485, 24 N. Y. Supp. 1060, affirmed 147 N. Y. 624, 42 N. E. 270.

Disparagement as to Conduct in Trade. — *Ingram* v. *Lawson*, 6 Bing. N. C. 212; *Solomon* v. *Lawson*, 8 Q. B. 823; *Keener* v. *Heckett*, L. R. 7 Q. B. 11; *Lattimer* v. *News*, 25 L. T. N. S. 44; *Henwood* v. *Hamson*, L. R. 7 C. P. 606; *Heddon Co.* v. *Ass'n*, 1894, 1 Q. B. 139; *Australian Co.* v. *Bennett*, 1894, A. C. 284; *R. R.* v. *Press Co.*, 48 Fed. 206; *American Co.* v. *Gates*, 85 Fed. 729; *Johnson* v. *Bradstreet Co.*, 77 Ga. 172; *Boynton* v. *Stocking Co.*, 146 Mass. 219; *Sherman* v. *Burham*, 107 Mich. 189; *Sunderlin* v. *Bradstreet Co.*, 48 N. Y. 188; *Bradstreet Co.* v. *Gill*, 72 Tex. 115. — Ed.

(*b*) OF GOODS.

PENNYMAN *v.* RABANKS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[*Reported in Croke, Elizabeth*, 427.]

ACTION upon the case for slandering his title. For that he said to J. S., who was in speech to buy the plaintiff's land, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," *ubi revera nulla talis dimissio facta fuit.* The defendant justifies by reason of two several leases by *parol* made unto himself. The plaintiff replies *de injuria sua propria absque tali causa.* Issue was joined, and found for the plaintiff. It was now moved in arrest of judgment that an action lay not for these words; because it appears by the defendant's justification that he intended of leases made of himself; and if a man claim estates, although they be false he shall not be punished. This was agreed by all the court, that no action lay against one for saying that he himself had title or estate in lands, &c., although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title. Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shown upon the third day of the next term. Afterwards, Pasch. 38 Eliz., it was adjudged for the plaintiff, FENNER *contradicente.*

PITT *v.* DONOVAN.

In the King's Bench, June 29, 1813.

[*Reported in* 1 *Maule & Selwyn*, 639.]

Action for slander of title. Plea: general issue.

At the trial before Graham, B., it appeared that the plaintiff had purchased certain lands at Bromesberrow from W. H. Y., and was about to sell the same to one Barton, but that the defendant wrote two letters to Barton warning him against completing the purchase, on the ground that W. H. Y. was insane at the time of his conveyance to the plaintiff. Barton thereupon declined to purchase the lands. It further appeared that a term of years in the estate was vested in the defendant as trustee for securing to Mrs. W. H. Y. her jointure, and that the defendant's wife was sister of W. H. Y., and his heir in the event of his dying without issue.

After an investigation of many hours the learned judge left the question to the jury upon the evidence, stating to them, in the course of his summing up, that in order to maintain the action some malice must be fixed on the defendant, that is, the action must be injurious and proceeding from an improper motive; that if the evidence satisfied them, as men of good sense and good understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict.

The jury found a verdict for the plaintiff, damages 40*s.*; whereupon a rule *nisi* was obtained in the last term for a new trial, on the ground of a misdirection.

Dauncey, *Abbott*, and *Puller*, now showed cause.[1]

The Attorney-General, *Jervis*, and *W. E. Taunton*, *contra*, were stopped by the court.

Bayley, J.[2] I am of the same opinion. It seems to me that the question for the consideration of the jury was, whether the defendant really believed that which he made the subject of his communication. I have no difficulty in saying that the defendant is not to be regarded as a mere stranger in this case. I think that he had not only a right, but, if he believed it to be true, that he was called upon to make the communication; for if at any subsequent time Mr. Y. should die without issue, and afterwards the defendant should bring an ejectment to try the sanity of this gentleman, it would afford matter for strong observation against him, that he had suffered Burton to complete the

[1] The statement of the case has been condensed; the argument for the plaintiff, and the concurring opinions of Lord Ellenborough, C. J., and Dampier, J., are omitted. — Ed.

[2] Le Blanc, J., had left the court.

purchase of this estate and to pay his money for it, without communicating to him that his title would be disputed. I think, therefore, that if the defendant really believed this contract to be void for the want of sanity in Y., it was not only his right but his duty to make the communication. Then where a person who is not to be treated as a mere stranger is sued in an action of this kind, two things are to be made out; first, that there is a want of probable cause; and secondly, that the party who made the communication acted maliciously. Now whether a party acted maliciously depends upon his own motives and on the view which the jury entertained of the mind of the party himself; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of some one other person; therefore if we refer to a mind that is sensible and reasonable, and which does not judge under the same pressure as the mind of the person in question might do, and make that sensible and reasonable mind the standard by which to judge of the state of mind of the person who is under that pressure, we shall be referring to an improper rule to judge by. The question here is not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated. I forbear to give any opinion on the weight of evidence, but the short question is, whether the defendant acted *bona fide*. That was the question for the jury to decide, but was not left to them in that form; that is, whether he acted maliciously or not. I therefore feel myself bound to say that there ought to be a new trial. *Rule absolute.*

PAULL *v.* HALFERTY.

In the Supreme Court of Pennsylvania, 1869.

[*Reported* 63 *Pa. St.* 46.[1]]

The representation in this case was, that an experienced iron manufacturer was of opinion that the iron ore in the land was but a "pocket" or nest, that would suddenly run out, and that he had used ore from the bank with other ores, in order to save it. This was a most successful mode of depreciating the value of the land as mineral land, and if this was false and malicious as well as injurious to the plaintiff, why shall he not be indemnified? The defendant did not pretend to prove that Col. Mathiot ever did say what he imputed to him, or that the fact, independently of him, was true. The witness, the party in treaty for the land, says that in consequence of this communication from the defendant, having confidence in him, he refused to go on with the purchase, and thus the matter ended. As the use of the words in question was not *in se* actionable, the plaintiff proved their falsity, so far as observation, experience, judgment, and the declarations of the defendant could go. This made a case for the jury, and it would, we think, have been manifest error in the judge to have affirmed the defendant's point.

It would hardly be denied, I think, if one were falsely and maliciously to represent that a piece of land and residence which a neighbor was about to sell was very unhealthy, and thus break off an advantageous sale, that this would be actionable, if damage was shown.

For misrepresenting personal qualities, such as the imputation of the want of chastity, by which an advantageous marriage was lost, an action lies, although the words employed may not in themselves be actionable. *Moody* v. *Baker*, 5 Cowen, 351, is of this sort, and there are many such in the books. For falsely representing a ship as unseaworthy, an action lies: *Ingram* v. *Lawson*, 9 Car. & P. 326. This, although the seaworthiness of the vessel might be claimed as "a standing refutation" of the slander, being a thing easily ascertained. I regard the text of Starkie on Slander, page 172, ed. of 1869, as quite to the point in a case of this kind. It is there said, "where a party is prevented from selling, exchanging, or making any advantageous disposition of land or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience he has suffered." Burr. R. 2622 is cited for this by the learned author. With all these analogies and principles to sustain the ruling of the learned judge, we think he committed no error in answering the defendant's first point as he did.

[1] This case is abridged. — Ed.

HATCHARD *v.* MÈGE and Others.

In the Queen's Bench Division, April 1, 1887.

[*Reported in* 18 *Queen's Bench Division Reports*, 771.]

Day, J.[1] This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say: —

"'Caution: Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word 'Delmonico' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom."

The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether

[1] Only the opinion of Day, J., is given. Wills, J., concurred. — Ed.

a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in Odgers on Libel and Slander, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name — slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria.* The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim. *Order for a new trial.*

LEWIN *v.* WELSBACH LIGHT CO.

In the Circuit Court of the United States, 1897.

[*Reported* 81 *Fed. Rep.* 904.]

Dallas, Circuit Judge. The bill sets forth that the complainants are now endeavoring to become active competitors of the defendants in the sale of incandescent lights, etc., and that one of the defendants manufactures such lights, etc., and the other of them is engaged in selling goods made by the former. It states that the Welsbach Light Company has brought suit against these complainants, in this court, for alleged infringement of a certain patent, and that the complainants have duly appeared in that suit. It avers that the patent so sued upon is solely for a process, and that the complainants cannot be held to be infringers thereof, because, as alleged, they are not manufacturers, but are exclusively engaged in selling the products of a certain manufacturer, against whom the Welsbach Light Company has brought suit, in the Southern district of New York, for alleged infringement of the same patent, and which suit the said manufacturer, who is amply responsible, is vigorously contesting. The bill also avers that the patent referred to is now invalid, under section 4887 of the Revised Statutes, by reason of the expiration of a certain Spanish patent for, as alleged, the same invention. The foregoing is the substance of paragraphs 1 to 8 of the bill. The gist of the complaint is presented in the paragraphs which follow, and may, I think, be fairly reduced to the statement that the defendants in this suit, with knowledge of the matters already mentioned, and with intent to destroy the complainants' business, have conspired to threaten, intimidate, and prevent the customers, present and prospective, of the latter, from dealing with them, "by the systematic and formulated plans, methods, and concerted conduct and action, in manner and form following," namely, by publishing and distributing "false, injurious, malicious, scandalous, threatening, and intimidating circulars or printed letters," containing intimidating threats of suit on the patent before referred to; by distributing such circulars among the customers and prospective customers of the complainants, and among the trade and the public generally; by spying upon the complainants' business, with the aid of detectives and others, and thus ascertaining their customers; by causing the defendants' attorneys to write letters to the complainants' customers (so ascertained), threatening suit against them on the patent aforesaid; and by causing the agents of the defendants to call upon the customers of the complainants and make like threats. The prayers are for an injunction to restrain the commission of the acts complained of, and for a decree for such damages as may be found by a jury upon a feigned issue to be awarded.

The allegation that the patent under which the defendants justify

is invalid, and, even if valid, is not infringed by the complainants, is one which, of course, might be made in defense of the suit which it is admitted the defendants have brought against the complainants. However impregnable that defense may be thought to be, it must be maintained in that proceeding before its availabilty can be assumed or adjudged in another. It is a mistake to suppose that, by demurring, the defendants have conceded its sufficiency. The demurrer avers that the bill does not show title to the relief sought, but this averment involves neither admission nor denial of invalidity or of noninfringement, but simply challenges the right of the complainants to have either of those questions tried in the manner they propose; and in my opinion, it is clear that they are not entitled to have them tried in this suit. Accordingly, the only legitimate inquiry now is: Are the acts and conduct of the defendants, as alleged in the bill, such as a court of equity should restrain the owner of a presumptively valid patent from doing and pursuing? What, then, does the bill allege that the defendants have actually done to the injury of the complainants? If nothing more were alleged than that the defendants have given notice, in good faith and in temperate language, of their purpose to proceed against alleged infringers, I would have no hesitation in holding that they had not exceeded their right. But the bill goes somewhat further. It alleges the intent of the defendants to be, not to protect and maintain their own rights, but, under color and pretense of that object, to destroy the complainants' business, in advance of any adjudication of the question of their right to maintain and continue it, and that, in pursuance of such intent, the circulars or letters complained of have not been properly framed, but are "false, injurious, malicious, scandalous, threatening, and intimidating." It is not manifestly impossible that this allegation may be sustained, and in such manner as to entitle the complainants to relief, though I may say that it does not seem to me to be probable, in view of the fact that the complainants have themselves been sued on the patent, that the defendants' good faith in notifying their purpose to proceed against other alleged infringers (if that is the substance of all they have done) can be successfully attacked; and the criticism of defendants' counsel upon the omission to set out any of the circulars in the bill calls attention to a matter which may be not without significance. If, upon the one hand, those circulars should turn out to be such notices as the defendants could rightfully give; or if, on the other hand, they shall, when produced, appear to be mere libels, — this suit could not be sustained. But my examination of the case, as it is now presented, has led me to believe that the bill should be retained, but that the questions which have been adverted to should be reserved for further consideration hereafter; and, accordingly, the demurrer is overruled, but without prejudice, and with leave to the defendants to again present the same matter by answer.

THE WESTERN COUNTIES MANURE CO. *v.* THE LAWES CHEMICAL MANURE CO.

In the Exchequer, June 9, 1874.

[*Reported in Law Reports, 9 Exchequer,* 218.]

Bramwell, B.[1] In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this, — that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary — which I do not think is the case — the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their

[1] Only the opinions of the court are given. — Ed.

comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is Young *v.* Macrae.[1] When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

Pollock, B. I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "*ubi jus ibi remedium.*" It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C. J., in his judgment in Malachy *v.* Soper. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shown. (Com. Dig. tit. Action on Case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, Malachy *v.* Soper, Evans *v.* Harlow,[2] and Young *v.* Macrae,[3] I would only observe that, in the two first-mentioned cases,

[1] 3 B. & S. 264. [2] 5 Q. B. 624. [3] 3 B. & S. 264.

there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances. *Judgment for the plaintiffs.*

HUBBUCK *v.* WILKINSON.

In the Court of Appeal, 1898.

[*Reported* 1899, 1 *Q. B.* 86.[1]]

[Defendants conducted certain "Paint-covering" experiments. Nine pounds of plaintiffs' paint were used and the same amount of the defendants. The expert reported that the defendants' paint had the advantage over the plaintiffs' in every respect. The plaintiffs alleged that the report was untrue; that the paint of the plaintiffs was in fact superior; and that they had lost trade by means of the publication of this report. Motion that no cause of action disclosed.]

Lindley, M. R. We will now consider the circular in its other aspect, namely, as a disparagement of the plaintiffs' goods. From this point of view the case is undistinguishable from *Evans* v. *Harlow* [2] and *Young* v. *Macrae*,[3] where malice, falsehood, and damage were all alleged, and yet it was held that what the defendant there published was not actionable. The ground of the decision in both cases was that for a person in trade to puff his own wares and to proclaim their superiority over those of his rivals is not actionable. The principle laid down in these cases has never been questioned, and it has been emphatically approved in *White* v. *Mellin*.[4] The defendants in this case give the results of some experiments with the two sorts of paint, and in paragraph 5 of the statement of claim the plaintiffs say that the report of the experiments is untrue, and that the trials were not fairly made. But, supposing this to be the case, the result is not altered. Paragraph 5 merely states more particularly what has been already stated before in paragraph 3, where the general charge of falsehood is made. Even if each particular charge of falsehood is established, it will only come to this — that it is untrue that the defendants' paint is better than or equal to that of the plaintiffs, for saying which no action lies. The particular reasons for making that statement are immaterial if the statement itself is not actionable. The statement of claim, then, as it stands, shows no reasonable cause of action; and the only other question is whether the plaintiffs should have liberty to amend by stating special damage as distinguished

[1] This case is somewhat abridged. — Ed.
[2] 5 Q. B. 624.
[3] [1895] A. C. 154.
[4] 3 B. & S. 264.

from general damage. In *Evans* v. *Harlow*[1] all the members of the court agreed that the declaration showed no cause of action. Patteson, J., however, went on to say that an action for disparaging the plaintiff's goods would not lie unless the plaintiff alleged that by reason of the disparagement he had been prevented from selling his goods to some particular person. But in *Young* v. *Macrae*[2] it was pointed out that there were different ways of disparaging a man's goods — that some false statements about them might be actionable if special damage could be proved, and *Western Counties Manure Co.* v. *Lawes Chemical Manure Co.*[3] was decided on this ground. But in *Young* v. *Macrae*[4] it was also pointed out that, if the only false statement complained of is that the defendant's goods are better than the plaintiff's, such a statement is not actionable, even if the plaintiff is damnified by it. The judgments of Cockburn, C. J., and of Wightman, J., who was a party to the decision in *Evans* v. *Harlow*,[5] are clear upon this point. Lord Herschell expressed himself very emphatically to the same effect in *White* v. *Mellin*,[6] and he expressed his clear opinion that it could make no difference whether a defendant said that his goods were better than the plaintiff's generally, or whether the particulars in which the plaintiff's goods were said to be inferior were specified. He pointed out with great force that, if actions in such cases were held to lie, the courts would be constantly engaged in trying the respective merits of the goods of rival traders, and the pernicious practice of bringing actions for mere purposes of advertising would be greatly encouraged: see also *British Empire Type Setting Co.* v. *Linotype Co.*[7] The present plaintiffs' case would not, therefore, be improved by the allegation and proof of actual loss. In other words, compliance with the master's order requiring more definite allegation of special damage would not improve the plaintiffs' case. The plaintiffs do allege actual loss attributable to the defendants' circular; and, if proof of such loss would enable the plaintiffs to maintain their action, it would be wrong summarily to strike out their statement of claim, although it might have been open to a demurrer before the Judicature Acts: see on this point *Ratcliffe* v. *Evans*.[8] We regard this case as falling within the principle established by *Evans* v. *Harlow*,[9] *Young* v. *Macrae*,[10] and *White* v. *Mellin*.[11] It is not necessary to consider how the case would have stood, if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or, at all events, not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of claim as showing no

[1] 5 Q. B. 624.
[2] 3 B. & S. 264.
[3] L. R. 9 Ex. 218.
[4] 3 B. & S. 264.
[5] 5 Q. B. 624.
[6] [1895] A. C. 164-5.
[7] 79 L. T. 8.
[8] [1892] 2 Q. B. 524.
[9] 5 Q. B. 624.
[10] 3 B. & S. 264.
[11] [1895] A. C. 154.

reasonable cause of action. But the circular complained of is such as plainly to constitute no cause of action even if all the allegations in the statement of claim are true. Under these circumstances the appeal must be allowed, with costs here and below; and, as there is no reason to suppose that the plaintiffs can improve their case by any amendments they can make, the court ought to exercise the power conferred upon it by Order xxv., r. 4, and order judgment to be entered for the defendants.

Appeal allowed.

Disparagement of Goods unfair. — *Fen* v. *Dixie*, Wm. Jones, 444; *Evans* v. *Harlow*, 5 Q. B. 624; *Young* v. *Macrae*, 3 B. & S. 264; *Manure Co.* v. *Manure Co.*, L. R. 9 Exch. 218; *White* v. *Mellin*, 1895, A. C. 154; *Typesetting Co.* v. *Linotype Co.*, 79 L. T. 8; *Hubbuck* v. *Wilkinson*, 1899, 1 Q. B. 86; *Dooling* v. *Budget Co.*, 144 Mass. 258; *Steketee* v. *Kirwin*, 48 Mich. 322; *Wilson* v. *Dubois*, 35 Minn. 471; *Weir* v. *Allen*, 51 N. H. 177; *Tobias* v. *Harland*, 4 Wend. 537; *Lubricating Co. v. Oil Co.*, 42 Hun, 153; *Paull* v. *Halferty*, 63 Pa. St. 46. — Ed.

(*c*) COERCION.

(*a*) WITH FORCE.

GARRET *v.* TAYLOR.

IN THE KING'S BENCH, EASTER TERM, 1620.

[*Reported in Croke, James,* 567.]

ACTION on the case. Whereas he was a Freemason, and used to sell stones, and to make stone buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c.

After judgment by *nihil dicit* for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act nor insult: and causeless suits on fear are no cause of action.

Sed non allocatur: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action: and although it be not shown how he was possessed for years, by what title, &c., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.

KEEBLE *v.* HICKERINGILL.

IN THE QUEEN'S BENCH, TRINITY TERM, 1706.

[*Reported in* 11 *East,* 574, *note.*]

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, *et de quodam vivario, vocato* a decoy pond, to which divers wild fowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them: the defendant know-

ing which, and *intending to damnify the plaintiff in his vivary*, and *to fright and drive away the wild fowl used to resort thither*, *and deprive him of his profit*, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond: and on the 11th and 12th days of November the defendant, *with design to damnify the plaintiff*, *and fright away the wild fowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wild fowl were frighted away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

Holt, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, first, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in

all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7, 8; 21 H. 6, 31; 9 H. 7, 7; 14 Ed. 4, 7; Vide Rastal. 662; 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.

IBOTTSON *v.* PEAT.

In the Exchequer, May 1, 1865.

[*Reported in* 3 *Hurlstone & Coltman*, 644.]

Bramwell, B.[1] I am also of opinion that the plaintiff is entitled to judgment. The declaration states that the plaintiff being possessed of certain land, the defendant unlawfully and with intent to drive and frighten away game then being on the land of the plaintiff, and to prevent him from shooting them, fired rockets and combustibles close to and over the land of the plaintiff, so as to be a nuisance to him. The defendant by his plea admits that the matter alleged is true, but sets up a right to do what is complained of for the purpose attributed to the defendant in the declaration, viz., to prevent him from shooting the game. Then what is the reason given? It is this: — "The game

[1] Only the opinion of Bramwell, B., is given. Pollock, C. B., Martin and Pigott, BB., concurred. — Ed.

which I frightened was game which you enticed away from the Duke of Rutland's land, by placing corn and other food for them on your land; and therefore I, as the servant of the Duke, in order to prevent you from shooting the game, and from continuing to entice them, did the acts complained of." In my opinion that is a bad plea. There is nothing in point of law to prevent the plaintiff from doing that which the plea alleges he has done. I say "in point of law," because it cannot be contended for a moment that any action would lie against the plaintiff. As to the propriety of such conduct between gentlemen and neighbors I say nothing. Where a person's game is attracted from his land, he ought to offer them stronger inducements to return to it. It is like the case I referred to in the course of the argument, Chasemore *v.* Richards,[1] which shows that if a man has the misfortune to lose his spring by his neighbor digging a well, he must dig his own well deeper.

Judgment for the plaintiff.

TARLETON AND OTHERS *v.* M'GAWLEY.

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 21, 1804.

[*Reported in Peake,* 205.]

THIS was a special action on the case. The declaration stated that the plaintiffs had sent a vessel called the "Bannister," with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to a part of the coast of Africa called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he well knowing the premises, but *contriving and maliciously intending to hinder and deter the natives from trading* with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the "Othello," of which he was master and commander, a certain cannon loaded with gunpowder and shot, at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c., and plaintiffs lost their trade.*

LORD KENYON. This action is brought by the plaintiffs to recover a

[1] 2 H. & N. 168; 7 H. L. 349.

satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the court may hereafter be taken whether it will support an action. I am of opinion it will. Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands.

MURDOCK, KERR & CO. *v.* WALKER ET AL.

IN THE SUPREME COURT OF PENNSYLVANIA, 1893.

[*Reported* 152 *Pa. St.* 595.]

BILL in equity for injunction.

The bill averred that plaintiffs are job printers who employ a large number of journeyman printers and pressmen; that about October 1, 1891, the printers and pressmen, then employed by plaintiffs, refused to work unless paid higher wages; that plaintiffs offered them work at the wages theretofore paid; defendants are members of associations known as Typographical Union No. 7, and Pressmen's Union No. 13, and the workmen employed by plaintiffs since October 1, 1891, are not members of said associations; that, ever since October 1, 1891, defendants, with others unknown, have unlawfully combined and conspired to prevent plaintiffs from taking into and retaining in their employ printers, not members of said unions, who would work at the wages plaintiffs were willing to pay, and to drive away workmen employed by plaintiffs, with malicious intent to control and injure the business of plaintiffs and to compel them to pay the wages demanded by the workmen who left their employment, and to employ only members of said unions, in pursuance of which conspiracy defendants have attempted to accomplish their unlawful purpose by threats, menaces, intimidation, and opprobrious epithets addressed to plaintiffs' workmen, by gathering in crowds about plaintiffs' place of business and places where plaintiffs' workmen board, following said workmen to and from their work, holding them up to the ridicule and contempt of bystanders, and divers other means of violence and intimidation; that such unlawful acts and conduct of defendants

have deprived plaintiffs of the services of many men who were ready and willing to work, and impeded and damnified plaintiffs in their business; and that defendants intend to continue their unlawful practices if not enjoined therefrom. The prayers were for injunction and general relief.

Per Curiam, January 3, 1893: —

This is an appeal from the decree of the Court of Common Pleas No. 3, of Allegheny County, restraining the defendants from gathering about plaintiffs' place of business, and from following the workmen employed by plaintiffs, or who may hereafter be so employed, to and from their work, and gathering about the boarding houses of said workmen; and from any and all manner of threats, menaces, intimidation, opprobrious epithets, ridicule, and annoyance to and against said workmen or any of them, for or on account of their working for the plaintiffs.

The decree is affirmed, for the reasons given by the learned judge of the court below in his opinion, and the appeal dismissed at the costs of the appellants.

Force upon the Customer. — Anon., Y. B. 9 H. VII. 7; Garrett *v.* Taylor, Cro. Jac. 567; Iveson *v.* Moore, 12 Mod. 262; Tarleton *v.* McGauley, Peake, 270; R. *v.* Hibbert, 13 Cox, 82; Re Debs, 158 U. S. 564; Mackall *v.* Ratchford, 82 Fed. 41; Dixon *v.* Dixon, 33 La. Ann. 1261; Mobile *v.* Supply Co., 30 So. 445; R. R. *v.* Hunt, 55 Vt. 570. — Ed.

(*b*) Without Force.

NOTE.

[*Comyn's Digest*, Tit. Action, *A.* 1.]

In all cases where a man has temporal loss, or damage by the wrong of another, he may have an action on the case to be repaired in damages.

NICHOL *v.* MARTYN.

Nisi Prius, 1799.

[*Reported* 2 *Esp.* 732.][1]

This was a special action on the case against the defendant for seducing the plaintiffs' customers. The plaintiffs were wholesale ironmongers; the defendant had been employed as their traveller, and the foundation of the action was that the defendant had told the country shopkeepers on his last coming that he was himself going into the same business after *Christmas*, and would then be obliged to them for an order on his own account.

Lord Kenyon, Chief Justice. A servant, while engaged in the service of his master, has no right to do any act which may injure his trade or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law it is *damnum sine injuria;* this request of business for himself was prospective.

GRAHAM *v.* ST. CHARLES STREET RAILROAD CO. AND THOMAS NEWMAN.

In the Supreme Court of Louisiana, 1895.

[*Reported* 47 *La. Ann.* 215.]

Nicholls, C. J. The action is founded upon the following allegations: That Newman is the foreman of the company, and as such has the power of employing and discharging its employés; that for a considerable time, less than one year, he has persistently abused his power to injure the plaintiff in his business of grocer; that Newman has instructed men in his employ that they must not deal at peti-

[1] This case is abridged. — Ed.

tioner's store, and that he would discharge them if they did; the injury which he estimates at not less than five hundred dollars.

The issue before us is whether, while the plaintiff, engaged in a lawful business, is legitimately earning his livelihood by and through the patronage of others, the defendant, a corporation, and its foreman, having the power of discharging large numbers of persons, can, without incurring legal liability therefor, without justifiable cause, and moved solely by malicious and wanton intent and design to injure the plaintiff, use their power of employment and discharge upon persons seeking employment from them, or already in their employ, so as to cause those who are already dealing with the plaintiff to desist from further doing so, and those who would desire to do so from carrying out their wishes by threats of non-employment or discharge. In so doing, the defendant would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice, the choice and will of others to the injury and damage of the plaintiff.

Remanded.

ROBISON *v.* TEXAS PINE LAND ASSOCIATION.

In the Court of Civil Appeals of Texas, 1897.

[*Reported* 40 *S. W. Rep.* 843.]

James, C. J. The petition to which demurrers were sustained is quite lengthy, and we copy appellant's statement of its nature: "The suit is for damages growing out of the conduct of the defendant in issuing checks at its store at Silsbee, Hardin County. The original suit was for the value of $154 in value of defendant's pay checks, and for damages for boycotting plaintiff and breaking up his saloon business, located about three miles from defendant's store. The district court held that there was a misjoinder of actions. The plaintiff then dismissed the claim for the $154 in checks, and amended his petition, claiming only the damages by the destruction of his business. The checks are made of cardboard, 1¼ inches in diameter, with these words printed around the outer edge: 'Texas Pine Land Association, Silsbee, Texas.' And across the face these words: 'Good for $1 in merchandise at the store. Not transferable.' That some of said checks are for smaller amounts than $1. That on the reverse side of checks is the name 'Jas. L. Kirby' written thereon. The defendant opened its store in 1894, and was engaged in cutting and shipping logs to sawmills at Beaumont, and issued said checks in payment of wages to its employés, who then took the same to the store, and purchased such goods as were needed. That the words 'Not transferable' are upon each check, yet the employés of the defendant bought country produce of the people, and paid for the same in checks, and that these people, who were not employés of defendant, and never had been,

bought goods of defendant at its store, and paid for same in checks, and said employés bought goods of defendant and paid in checks, and said employés bought goods of defendant [plaintiff] and paid in checks, and he in turn bought goods of plaintiff [defendant], and paid for same in these checks, and traded some of the checks to others who were not employés of defendant, who bought goods of defendant and paid in checks; and that the defendant knew of this trade in its checks, and did not object thereto until the plaintiff had a great many of them, and then refused to take the checks from him in payment of goods, and refused to take checks from persons who had bought or traded for same with plaintiff. And the defendant, for the purpose of injuring plaintiff in his business, at a time after the plaintiff had taken and received the checks of the defendant which he now has, stated to its employés that it (defendant) would discharge each and every one of its employés from its service in case any one of them should buy goods, liquors, etc., or trade in any manner whatever with the plaintiff; and, further, the defendant then and there stated to its clerks and other employés that it would not take up any checks, and receive the same in payment of its goods, wares, and merchandise, from any person whomsoever, when and where said checks had passed through the hands of Jim Robison, the plaintiff. Plaintiff further alleges that he was at this time making a profit of $150 a month in his business; that among his customers were the defendant's employés, and other persons who used defendant's checks, and that, by reason of defendant's order to its employés, he could no longer take the checks, except a few, and his customers could not trade with him, etc.; and that he was thereby damaged by loss of trade in the amounts as claimed." The petition further disclosed that plaintiff was engaged in selling goods of the same kind and quality as were sold at defendant's store to some of defendant's employés and other people in the neighborhood; in other words, that they were, to some extent, competitors in trade. There is also an allegation that defendant had, by its agents and employés, and for its own dishonest and corrupt purposes, and for the purpose of destroying the competition in trade of plaintiff in the sale of goods, wares, and merchandise, threatened its employés with discharge if they refused to sign a certain petition for a local option election, or if they voted against the same, — plaintiff being engaged in the sale of liquors, — which election, if it had carried, would have closed up plaintiff's business. This is alleged probably to show the malice of defendant towards plaintiff. The action upon the checks that had been taken by plaintiff in trade was abandoned, and the prayer of the amended petition was for $650 actual and $1000 punitory damages, for loss of business through the act of defendant in threatening its employés with discharge in case they should trade with plaintiff, and in announcing its determination not to honor any checks that passed through the hands of plaintiff.

The principles stated in *Delz* v. *Winfree*, 80 Tex. 400, 16 S. W. 111, apply in this case. See, also, *Graham* v. *Railroad Co.* (La.) 16 South

806. According to plaintiff's allegations, competition in trade existed between plaintiff and defendant, and it was legitimate for defendant to appropriate to itself all the customers it could command, even to the extent of driving plaintiff out of business, provided the means used for that purpose did not contravene any law, or violate a definite legal right of plaintiff. The latter had no legal right to protection against competition. He had no superior right to the trade of defendant's employés or that of other persons. Poll. Torts, 408. The statute in reference to conspiracies against trade does not apply to this case, where there is no combination, and when the acts complained of as affecting competition are the acts of defendant alone. If the defendant could so control its employés as to prevent their dealing with plaintiff, or so control their wages as to divert them from the channels of plaintiff's business in favor of its own, we know of no rule making it actionable. Had the defendant no proper interest of its own to subserve in so doing, but had acted wantonly in causing loss to plaintiff, the rule would be different. The fact that defendant's purpose by its acts was to break plaintiff up in business would not give the cause of action, for that is the natural result of successful competition. Defendant might at any time have stopped the issuing of checks, and plaintiff could not have complained. It had a right, if the employés were satisfied to work on such terms, to pay the latter directly in goods, and he could not complain, or in checks redeemable in goods only by them and certain other persons. It could not be required to treat the checks as money in the hands of other persons, which is practically a contention of plaintiff. If they could stop the system altogether without giving a right of action in tort, it would follow that they could place restrictions on the use of checks without incurring such liability. This is not a suit to recover the value of checks taken by appellant, but one in which he seeks to recover in tort for the invasion of a right, when he fails to show the existence of any right. A system whereby such checks would be honored in the hands of any one except plaintiff was calculated to insure trade at defendant's store, and diminish that of its rival; and, as plaintiff has no definite right to the public trade, he has no legal right to complain that defendant absorbed it by the manner of managing its business, and its relation with its employés. The judgment is affirmed.

ALLEN *v.* FLOOD AND TAYLOR.

In the House of Lords, 1898.

[*Reported* 1898, *A. C.* 1.[1]]

[Flood and Taylor were members of the Shipwright's Union; Allen was delegate of the Society of Boilermakers. Allen threatened the Glengall Iron Co. that unless Flood and Taylor were discharged, he would call out the Boilermakers next day; Flood and Taylor were turned off, and subsequently sued Allen. The Divisional Court held for the plaintiffs; the Court of Appeal affirmed; but the House of Lords reversed. Part of the opinion of Lord Macnaughten was as follows: —]

Now before I proceed to consider the legal grounds on which Kennedy, J., and the Court of Appeal decided the case against Allen, I should like to ask what there was wrong in Allen's conduct. He had nothing to do with the origin of the ill-feeling against Flood and Taylor. He did nothing to increase it. He went to the dock simply because he was sent for by one of the men of his union. It seems to be considered the duty of a district delegate to listen to the grievances of the members of his union within his district, and to settle the difficulty if possible. The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was by going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned, the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work among them.

If so, it is difficult to see why fault should be found with Allen for going in their place and on their behalf and saying what they would have said themselves.

As regards the meaning of the word "induce," I do not think the jury got much assistance. I rather gather from the summing-up that the jury were given to understand that if they thought that Allen merely represented the state of things as it was — and the feeling of the iron-men at the Regent's Dock — they would be at liberty to answer the questions put to them about Allen in the negative. But the answer must be the other way if they thought that Allen went further, and assumed to represent the union, and to speak as if he

[1] This case is much abridged. — Ed.

had the power of the union at his back; that would be a threat and would amount to "inducing." Now, I must say that I do not think it can be said that Allen did "induce" the company to discharge the plaintiffs. Certainly it cannot be truly said that he procured them to be discharged. It was not his act that prevented the company from continuing to employ them. If the whole story had been a fiction and an invention on his part I could have understood the finding of the jury. But I do not think there was any misrepresentation on Allen's part. I do not think there was any exaggeration. Nor, indeed, was any such point made at the trial.

So we see now, I think, what the findings of the jury come to, if they are to be treated as being in accordance with the evidence. They must mean that Allen induced the company to discharge the plaintiffs, by representing to the manager, not otherwise than in accordance with the truth, the state of feeling in the yard, and the intentions of the workmen, and that he did so "maliciously," because he must have known what the issue of his communication to the manager would be, and naturally perhaps he was not sorry to see an example made of persons obnoxious to his union. But is his conduct actionable? It would be very singular if it were. No action would lie against the company for discharging the two shipwrights. No action would lie against the iron-men for striking against them. No action would lie against the officers of the union for sanctioning such a strike. But if the respondents are right the person to answer in damages is the man who happened to be the medium of communication between the iron-men and the company, — the most innocent of the three parties concerned, for he neither set the "agitation" on foot, nor did he do anything to increase it, nor was his the order that put an end to the connection between employer and employed. It seems to me that the result would have been just the same if Edmonds had told Mr. Halkett what was going on in the yard, or if Mr. Halkett had learned it from Flood and Taylor themselves.

Even if I am wrong in my view of the evidence and the verdict, if the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word, and that he procured the dismissal of Flood and Taylor, that is, that it was his act and conduct alone which caused their dismissal, and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct, if it could be inquired into, was without justification or excuse.

The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point.

But if the immediate agent cannot be made liable, though he knows what he is about, and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong. But if that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement, — suppose a man declines to give a servant a character because he is offended with the servant for leaving, — suppose a person of position takes away his custom from a country tradesman in a small village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling, — no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend of his not to employ the tradesman any more. Neither the one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is, that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character, and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation and wide scope for prejudice.

In order to prevent any possible misconstruction of the language I have used, I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism com-

monly known by the name of "boycotting," and other forms of oppressive combination, seem to me to depend on considerations which are, I think, in the present case, conspicuously absent.

No Force upon the Customer. — Anon., Y. B. 11 H. IV. 47 ; Nichol *v.* Martyn, 2 Esp. 732 ; Rogers *v.* Dutt, 13 Moo. P. C. 209 ; Mogul S. S. Co. *v.* McGregor, 1892, A. C. 25 ; Dueber Co. *v.* Howard Co., 66 Fed. 637; Gunther *v.* Altman, 60 N. E. 355 ; Fallon *v.* Schilling, 29 Kans. 292 ; Hundley *v.* R. R., 48 S. W. 429 ; Graham *v.* R. R., 47 La. Ann. 214 ; Heyward *v.* Tileson, 75 Me. 225 ; Walker *v.* Cronin, 107 Mass. 505 ; Mallan *v.* Brown, 13 Wend. 261 ; Payne *v.* R. R., 13 Lea 507; Robinson *v.* Land Co., 40 S. W. 843 ; Reycroft *v.* Traintor, 68 Vt. 219. — Ed.

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